2000

Brighton Corporation v. Gregory M. Ward : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

BRIGHTON CORPORATION, a Utah corporation, Plaintiff and Appellee, v. GREGORY M. WARD, Defendant and Appellant.	Supreme Court No. 20000171-SC Priority No. 15

BRIEF OF APPELLANT GREGORY M. WARD

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
JUDGE DAVID S. YOUNG

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List of All Parties to the Proceeding

The following were the original parties in the proceeding below:

Plaintiff: Brighton Corporation

Defendants: Isabel M. Coats, Walter M. Coats, Gregory M. Ward, and Doug's Tree Service, Inc.

Gregory M. Ward acquired the property that is the subject of this action from Isabel M. Coats and Walter M. Coats subsequent to the commencement of the action. Thereafter, no claims were prosecuted by the plaintiff against the Coats or Doug's Tree Service, and the plaintiff Brighton Corporation and the defendant Gregory M. Ward were the only parties in the case at the trial of this matter. Mr. Ward also represents the interest of his family through the entity, Brighton Group. Brighton Group has an interest in the property.

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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j).

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in determining that the conditional proposed settlement presented by the parties to the court constituted a binding and enforceable contract and settlement agreement. This issue was preserved in the trial court by Ward's Objection to the Motion to Enforce Settlement Agreement (R. 1315-82). Standard of Review: Whether a contract exists is a conclusion of law reviewed for correctness giving no deference to the trial court's determination of the issues presented. Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah Ct. App. 1992); State v. Pena, 869 P.2d 932, 936 (Utah 1994).

2. Whether the trial court erred in allowing Brighton to pave a private roadway across Ward's property and whether Brighton should be ordered to remove the paved roadway and restore Ward's property to its original condition. Brighton's motion to pave the roadway was granted without notice or an opportunity for Ward to be heard. However, Ward did file an objection to the proposed order, which objections were denied. See Objection to Proposed Order Allowing Plaintiff to Pave Private Roadway (R. 1284-1306). Standard of Review: This issue revolves around whether the pavement of the private roadway was allowed by a contract between the parties (i.e., the proposed settlement agreement). Whether a contract exists is a conclusion of law reviewed for

correctness giving no deference to the trial court's determination of the issues presented. Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah Ct. App. 1992); State v. Pena, 869 P.2d 932, 936 (Utah 1994).

3. Whether the trial court erred in ruling on summary judgment (1) that Ward must compensate Brighton for all further costs, including attorney's fees, associated with any review by Brighton of any new plans submitted by Greg Ward as a condition of reviewing those plans; (2) that it was reasonable for Brighton to require a licensed architect to sign any plans for the cabin as a condition of reviewing any plans; and (3) that it was reasonable for Brighton to apply the Foothills and Canyons Overlay Zone ordinance of Salt Lake County in reviewing plans submitted by Ward. This issue was preserved below by Ward's opposition to the motion for summary judgment. (R. 881-960). Standard of Review: Whether a party is entitled to summary judgment is a conclusion of law reviewed for correctness giving no deference to the trial court's determination of the issues presented. Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993); State v. Pena, 869 P.2d 932, 936 (Utah 1994).

4. Whether the trial court erred in refusing to consider at trial the latest set of plans submitted to Brighton by Ward. The Court ruled over Ward's objection that it would not consider the latest set of plans submitted to Brighton by Ward. (Trial Transcript, Vol. 1., R. 1750:32-50). Standard of Review: The trial court's interpretation and application of the unambiguous terms of the November 3, 1999 Order which set forth the issues to be tried should be reviewed under the same standard as the interpretation of

an unambiguous contract, that is, as a conclusion of law reviewed for correctness giving no deference to the trial court's determination of the issues presented. Saunders v. Sharp, 806 P.2d 198, 199-200 (Utah 1991).

5. Whether the trial court erred in ruling at the trial of this matter that the plans submitted by Ward were properly rejected by Brighton. This was the issue tried by the court and was preserved below during the entire trial proceeding. (Trial Transcripts, Vols. 1-3, R. 1750-52). Standard of Review: The trial court's determination that approval of the plans had not been unreasonably withheld constitutes the interpretation of a contract that is reviewed for correctness giving no deference to the trial court's determination of the issues presented. Saunders v. Sharp, 806 P.2d 198, 199-200 (Utah 1991).

6. Whether the trial court erred in refusing to allow Carl Eriksson, who was both an expert witness and a fact witness, to testify at the trial of this matter. This issue was preserved at trial through Ward's objection to the trial court's disallowance of the testimony of Carl Eriksson (Trial Transcript, Vol. I, R. 1750:224-30) and Ward's Motion to Reconsider Disallowance of Testimony of Carl Eriksson (R. 1533-45) which was denied. Standard of Review: The admissibility of expert testimony is reviewed under an abuse of discretion standard. State v. Larsen, 865 P.2d 1355, 1361 (Utah 1993).

7. Whether the trial court erred in denying Ward's application for determination that consent to build the cabin had been unreasonably withheld after the July 13, 1995 evidentiary hearing. This issue was preserved for trial throughout the

hearing held on this issue (Transcript of July 13, 1995 Hearing, R. 1753). Standard of Review: The trial court's determination that approval of the plans had not been unreasonably withheld constitutes the interpretation of an unambiguous contract that is reviewed for correctness giving no deference to the trial court's determination of the issues presented. Saunders v. Sharp, 806 P.2d 198, 199-200 (Utah 1991).

8. Whether the trial court erred in not recusing Judge David S. Young for bias and prejudice and whether the Supreme Court should order that Judge David S. Young be recused from this action for bias and for denying Ward his due process rights throughout the proceedings below. This issue was preserved through Ward's Motion Requesting Recusal and Reassignment (R. 651-77) and Ward's objections to the trial court's rulings. Standard of Review: The refusal to recuse Judge Young is a legal conclusion reviewed for correctness. State v. Pena, 869 P.2d 932, 936 (Utah 1994). The constitutionality of a trial court's actions are considered conclusions of law reviewed for correctness. State v. Hoff, 814 P.2d 1119 (Utah 1991) (in the criminal context reviewing whether trial court had substantially complied with constitutional requirements for entry of guilty plea).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES

Rule 702 of the Utah Rules of Evidence

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 601 of the Utah Rules of Evidence

> Every person is competent to testify to be a witness except as otherwise provided in these rules.

Rule 602 of the Utah Rules of Evidence

> A witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

Rule 63(b) of the Utah Rules of Civil Procedure (1997)

> Whenever a party . . . shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call another judge to hear and determine the matter. Every affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. . . . . No party shall be entitled in any case to file more than one affidavit . . . .

Utah Code of Judicial Conduct, Canon 3E.1

> A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned . . .

United States Constitution, Amendment XIV

> nor shall any State deprive any person of life, liberty, or property, without due process of law.

Utah Constitution, Article I, § 7

> No person shall be deprived of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the attempt by Gregory M. Ward ("Ward") an owner of real property in Brighton, Utah to build a family cabin on his property (the "Property"). The Property is subject to restrictions in a Special Warranty Deed that provide that the Property "shall be limited to the construction of a single residential building containing not in excess of twelve hundred square feet on each floor, and not containing more than two floors." Special Warranty Deed (Trial Exhibit 44) (attached as Exhibit A to Addendum). The Special Warranty Deed also gives Brighton Corporation ("Brighton"), an adjoining landowner, the right to review and approve plans for the cabin and provides that Brighton shall give such approval in a "timely" manner and not unreasonably withhold such approval. Id. This is an appeal from judgment of the Third District Court, Salt Lake County, State of Utah, after bench trial, and from the prior interlocutory orders entered by the court, all related to Brighton's refusal to approve Ward's plans for a cabin.

B. Course of Proceedings in the Trial Court

This action was filed by Brighton on August 29, 1994, seeking, among other things, to enjoin Ward from building a cabin on his property without approval from Brighton. Complaint (R. 1 - 19). A hearing on a motion for preliminary injunction was held on September 26, 1994 (Transcript at R. 1742). The Court entered a preliminary injunction preventing the defendant Ward from proceeding with the construction of his

cabin or even obtaining a building permit without approval from Brighton. October 4, 1994 Order 308-16). Ward does not appeal that ruling.

Ward subsequently submitted revisions of the 1994 plans to Brighton in an attempt to obtain approval to build his cabin. The revised plans submitted by Ward contained only two floors and no more than 1,200 square feet on each floor in compliance with the Special Warranty Deed. See Application for Determination that Approval Has Been Unreasonably Withheld. (R. 317 - 420). Nevertheless, Brighton refused to approve the plans. On July 13, 1995, the Court denied a motion by Ward requesting an order that Brighton had unreasonably withheld approval of the plans. See August 15, 1995 Order. (R. 467) (attached to Addendum as Exhibit G).

Ward submitted new plans to Brighton for approval after the July 1995 hearing. These plans also complied with the "two floors" and "1,200 square feet" requirements. Nevertheless, Brighton refused to approve the plans. (See, e.g. Affidavit of Mary Barton, R. 501 - 524). Ward filed a renewed motion for an order that Brighton was unreasonably withholding approval. (R. 468-70). However, the Court refused to hear Ward's motion, ruling that Ward would have to proceed to trial. June 25, 1996 Order (R. 612-13).

On or about May 16, 1997, Ward filed a motion requesting the recusal of Judge Young based on the fact that Brighton's counsel played an active and advertised role in Judge Young's retention election campaign in 1996. (R. 651-53). The court denied the motion. See June 9, 1997 Minute Entry (R. 718-21) (attached to Addendum as Exhibit H).

On December 22, 1998, the plaintiff filed a motion for partial summary judgment requesting that the Court rule as a matter of law (1) that Ward must compensate Brighton for all further costs, including attorney's fees, associated with any review by Brighton of any new plans submitted by Greg Ward as a condition of reviewing those plans; (2) that it was reasonable for Brighton to require a licensed architect to sign any plans for the cabin; and (3) that it was reasonable for Brighton to apply the Foothills and Canyons Overlay Zone ordinance of Salt Lake County in reviewing plans submitted by Ward. (R. 802-04). The Court granted the summary judgment motion in an order dated March 3, 1999. (R. 1185-88) (attached to Addendum as Exhibit I).

Trial was scheduled for March 3, 1999. (R. 1005). On that day the parties informed the Court of a proposed conditional settlement. The parties requested and obtained a new trial date in the event the settlement was not accomplished. On September 3, 1999, Brighton filed a Motion to Enforce Settlement Agreement. (R. 1197-99). In this motion, Brighton requested that the trial court allow it to pave the gravel roadway running across Ward's property in violation of the Property Use Agreement's requirement that the road remain a gravel road. The court granted Brighton's motion in chambers on September 8, 1999, before Ward had an opportunity to respond to the motion. See Affidavit of Douglas J. Parry in Support of Petition for Emergency Extraordinary Writ ("Parry Aff.") at ¶¶ 9-13 (filed in Appellate Case No. 990845) (attached to Addendum as Exhibit J). The court's ruling was reflected in a September 21, 1999 order. (R. 1392 - 94) (attached to Addendum as Exhibit K).

On November 3, 1999, the court entered an order holding that the parties had entered into a binding settlement agreement and that the trial scheduled for November 17-18, 1999, would be on the issue of whether the plans submitted by Ward to Brighton after the hearing on March 3, 1999, complied with the settlement agreement. See November 3, 1999 Order (R. 1417 - 18) (attached to Addendum as Exhibit L).

C. Disposition in the Court Below

Trial was held on November 17-19, 2000. The trial court ruled, among other things, that the trial would be held on whether plans submitted by Ward in June 1999 complied with the conditional settlement agreement. The court refused to consider later plan revisions that had been submitted by Ward on October 6, 1999 (the "October 1999 Plans"). The court held that the June plans did not comply with the conditional settlement agreement and that Brighton properly refused to consider the October 1999 Plans. See February 3, 2000 Order (R. 1690 -92) (attached to Addendum as Exhibit M).

STATEMENT OF FACTS

A. Background

In 1941 Fred and Sarah Moreton (Ward's grandparents) acquired real property in Brighton, Utah. See, e.g., Transcript of September 6, 1994 hearing (R. 1743:44-45; 1743:75). The Moretons built a family cabin on the property. Id. In 1969, the Moretons placed the property into Brighton Corporation, their family corporation, and gave one-fifth of the stock of the corporation to each of their children--Mary Barton, Isabel Coats (Ward's mother), Ed Moreton, Fred Moreton, and Sarah Kunz. (R. 1743:46-47; 1743:75).

In July 1990, the five children decided to divide and distribute the assets of Brighton Corporation among themselves. (R. 1743:47; 1743:75). The real property was valued at approximately $265,000. The property was divided into three parcels--the main parcel, which included the existing family cabin, and two adjoining parcels. (R. 1743:48; 1743:75). The adjoining parcels were to be subjected to certain restrictive covenants. (R. 1743:49). The children drew lots and, in accordance with the draw, one child chose the main parcel, two children chose the two adjoining parcels with some cash, and the other two children chose to receive $53,000 in cash. (R. 1743:48-49; 1743:75).

Mary Barton drew the first lot and chose the main parcel. (R. 1743:49). Mary Barton is, for all purposes, Brighton Corporation. (R. 1743:4; 1743:75). Isabel M. Coats acquired the adjoining parcel of property to the west of the main parcel (the "Property") by Special Warranty Deed executed on July 3, 1991. (R. 1743:50; 1743:75; Trial Exhibit 44).[1] A Property Use Agreement was also entered into by the parties on July 3, 1991. (See Trial Exhibit 45). The Appellant Gregory M. Ward acquired the Property from his mother, Isabel M. Coats, in August 1994. (R. 1743:207). This litigation was commenced in August 1994 by Brighton Corporation (Mary Barton) to enforce the restrictions in the Special Warranty Deed against her nephew, Gregory M. Ward.

B. The Restrictive Covenants

The Special Warranty Deed provides, in pertinent part, as follows:

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[1]Mary Barton was the grantor of deed to the property acquired by Isabel M. Coats.

> BUILDING RESTRICTIONS. The above-described premises shall be limited to the construction of a single residential building containing not in excess of twelve hundred square feet on each floor, and containing not more than two floors. . . .
>
> Grantor expressly reserves the right to review and approve the proposed placement, plans, and designs for any improvement to be located upon the above-described property, which approval shall be timely and shall not be unreasonable withheld.

Trial Exhibit No. 44 (attached to Addendum as Exhibit A).

The Property Use Agreement provides, in pertinent part, as follows:

> . . . the designated 20 foot right-of-way as described on the deed from Brighton to Coats as used for roadway purposes shall consist of a single lane gravel roadway for vehicular travel . . . .

Property Use Agreement (Trial Exhibit No. 45) (attached to Addendum as Exhibit B).

C. Facts Related to Specific Issues on Appeal

The following Statement of Facts is organized by the facts relevant to each of the issues on appeal.

Issue 1: Whether the trial court erred in determining that the conditional proposed settlement presented by the parties to the court constituted a binding and enforceable contract and settlement agreement.

On March 3, 1999, the parties in this case informed the trial court that they were contemplating a settlement of this action. March 3, 1999 Transcript (R. 1745) (attached to Addendum as Exhibit C). The genesis of the proposed settlement began with an October 28, 1998 letter sent by Brighton to Ward proposing a manner of resolving the dispute between the parties and requesting that Ward make certain revisions to prior

plans. October 28, 1998 letter (Trial Exhibit No. 2) (attached to Addendum as Exhibit D). Ward submitted plans to Brighton on February 5, 1999.

On February 22, 1999, Brighton sent a letter to Ward rejecting those plans for three general reasons: (1) the plans were allegedly incomplete and lacked necessary detail; (2) the plans allegedly did not adequately clarify the design of the north porch of the cabin; and (3) the patio on the south side of the cabin "might" have required what Brighton believed to be an excessive cut in the property. February 22, 1999 letter (Trial Exhibit No. 3) (attached to Addendum as Exhibit E).

Ward's counsel responded on February 25, 1999, explaining that the claimed "deficiencies" were not deficiencies at all, but stating that Ward "believe[s] that these three issues can be resolved," and that Ward would submit revised plans to attempt to address Brighton's concerns. See February 25, 1999 letter from Douglas J. Parry to James S. Jardine (R. 1252-54). On March 2, 1999, Brighton's counsel acknowledged that the settlement discussion was merely a proposal, stating that "[i]n an effort to see if this matter can be settled prior to trial, I am writing to clarify our understanding of our discussions on a proposed settlement." March 2, 1999 letter from James S. Jardine to Douglas J. Parry (emphasis added) (R. 1256-58). See also Brighton's Reply Memorandum in Support of Motion to Enforce Settlement Agreement (R. 1400) ("Brighton agrees that the proposal stated in the March 2, 1999 letter was only a proposal, i.e., it was not accepted on that day.").

The October 28, 1998 letter specifically provided that "any settlement must be fully and completely documented and incorporated in an order of the Court that includes all approved plans . . . ." October 28, 1998 letter at 2 (Trial Exhibit No. 2). Likewise, the March 2, 1999 letter from Brighton's counsel indicated that "it is essential that final plans, if approved, be included and incorporated into the Court's final order." March 2, 1999 letter from James S. Jardine to Douglas J. Parry (R. 1258).

On March 3, 1999, the parties informed the Court of the proposed settlement. The parties requested and obtained a trial date at the end of April 1999 in the event the settlement was not accomplished. March 3, 1999 Transcript (R. 1745:4, 25). The following excerpts from the record establish that a settlement had not yet been reached, and would only be reached on the satisfaction of actions that remained to be taken.

> MR. JARDINE: It, in fact, Your Honor, is a conditional settlement we'd like to read into the record. It's conditional because certain actions remain to be taken. March 3, 1999 Transcript (R. 1745:3, lines 17-19) (emphasis added).

> MR. JARDINE: We propose to state the agreement on the record and then to formalize it later in an order for the Court to sign, if the remaining issues and actions are satisfactorily resolved. And we would ask the Court to continue the trial date, and I think Mr. Parry will speak to that. We've agreed that we will review the contemplated plans to be submitted to us, within seven days of receiving them, and I think Mr. Parry will ask you about available trial dates within that time frame. Id. at 3-4 (emphasis added).

> MR. JARDINE: There remains an issue outstanding that the future plans submitted to us will address, which is the location and design of the porch or front entrance proposed on the north side. Id. at 5, lines 15-16 (emphasis added).

MR. JARDINE: ". . . if the issues raised in the letters of October 28, 1998, and February 22, 1999, and the noted ambiguities are addressed and resolved . . . [Brighton will not] disapprove the plans." Id. at 6, lines 11-15 (emphasis added).

MR. JARDINE: There are other issues to address in terms of the proposed settlement. A term of the proposed settlement is that Mr. Ward will withdraw all plans filed to date with the county . . . . Id. at 6, lines 16-19 (emphasis added).

MR. JARDINE: Next, with regard to Brighton Corporation's waterline easement, which comes across the property, the proposed resolution is that the claim of trespass and relocation would be dismissed, if everything else is resolved . . . Id. at 10, lines 20-23 (emphasis added).

MR. JARDINE: I understand that if all of this is achieved and accomplished and finally resolved, that all other claims between the parties would be dismissed and that a final order would be entered with the Court, setting forth all of the terms of the settlement, attaching the plans, ... Id. at 13, lines 6-10 (emphasis added).

MR. JARDINE: One of the issues is whether the road would be paved. It's our understanding that if this goes through, we would pave the road, at Brighton Corporation's expense. Id. at 15, lines 16-19 (emphasis added).

MR. PARRY: My only other thing is the time for trial, if necessary. I'm hoping that you'll have two days sometime in late April or early May. Id. at 17, lines 5-7.

THE COURT: Okay. Let's talk about that. Let me ask you this--when would you be aware of whether you might want those days? How soon? Id. at 17, lines 10-12.

THE COURT: Thank you each. All right, based then upon that stipulation, the Court will strike the trial date anticipating, hopefully, that the whole matter will be resolved upon this stipulation. The Court has continued a trial date, in anticipation that the matter will be resolved, however, to April 29 and 30, if needed, for the trial. All right? Id. at 25, lines 1-7 (emphasis added).

Ward agreed to settle this matter on the condition that Brighton approve his plans in time for him to start construction in the 1999 building season. Affidavit of Greg Ward ("Ward Aff.") (R. 1365). See also March 3, 1999 Transcript (R. 1745:17-18) (Ward's counsel requested a trial date before June 1999 so that Ward could build in 1999). Ward testified that he believed that the settlement was a conditional proposal. Trial Transcript, Vol. II (R. 1751:453). Ward also relied on Brighton's representations that a prior survey (the "Sneidman" survey) was accurate. See October 28, 1998 letter at 3. An updated survey conducted after March 3, 1999, revealed that the Sneidman survey was not accurate. See Updated Survey (Trial Exhibit No. 46).

Ward subsequently submitted revised plans to Brighton in April 1999 (hereinafter the "April 1999 Plans"). Trial Transcript, Vol. 1 (R. 1750:59, lines 11-13; Trial Transcript, Vol. II (R. 1751:348). At Brighton's request, Ward supplemented those plans in June 1999 (hereinafter the "June 1999 Supplements").[2] Trial Transcript, Vol. I (R. 1750:61, lines 12-17). Ward's architect, Kimble Shaw, testified at trial that Brighton's counsel informed him that if he produced the supplemental drawings, the parties would then have a settlement. Trial Transcript, Vol. II (R. 1751:350-51).

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[2]At trial, Mary Barton referred to the April 1999 Plans as "Preliminary Plans" and the June 1999 Supplements as "Final Plans." Trial Transcript, Vol. I (R. 1750:56). However, Kimble Shaw explained that the June 1999 plans were "supplementary drawings" with information organized in a different manner according to a specific request by Brighton. Trial Transcript, Vol. II (R. 1751:344-350). The two plans were meant to be read together.

Brighton refused to approve Ward's plans. See June 23, 1999 letter from James S. Jardine to Douglas J. Parry (Trial Exhibit No. 13). Ward determined that Brighton was not acting in good faith to reach a settlement and informed Brighton's counsel that there was no use in pursuing settlement discussions any further and that the parties should prepare for trial. See July 7, 1999 letter from Douglas J. Parry to James S. Jardine (Trial Exhibit No. 35; R. 1272). Brighton responded by filing a Motion to Enforce Settlement Agreement. (R. 1197). On October 22, 1999, the Court granted Brighton's motion, ruling that the stipulation stated by counsel on the record on March 3, 1999, constituted a binding and enforceable contract and that the terms of the contract were stated in the March 3, 1999 hearing and the documents incorporated therein (i.e., the letters and the checklists). Nov. 3, 1999 Order (R. 1417-18). See also Feb. 3, 2000 Order (R. 1690-91).

Prior to the March 3, 1999 hearing, the trial court had granted a motion for partial summary judgment in which the trial court ordered that Ward must compensate Brighton for all further costs , including attorney's fees, associated with any review of new plans submitted by Ward to Brighton. March, 3, 1999 Order (R. 1185-88). The payment of costs and attorney's fees as a condition of review is not mentioned in the proposed settlement. See Trial Transcript, Vol. II (R. 1751:280-81) (James S. Jardine admits that the settlement "is silent" on the issue of attorney's fees). Nevertheless, after the March 3, 1999 hearing, Brighton continued to claim that Ward must pay Brighton's costs and attorney's fees associated with Brighton's review of future plans. See, e.g. June 23, 199 letter from James S. Jardine to Douglas J. Parry at 5 (Trial Exhibit No. 13) ("Based on the

earlier order of partial summary judgment, Brighton will be submitting an invoice for costs incurred in plan review); July 28, 1999 letter from James S. Jardine to Douglas J. Parry (R. 1413; Trial Exhibit No. 36) (requesting payment of $5,446.50 in attorney's fees); October 11, 1999 letter from Scott A. Hagen to James K. Tracy (Trial Exhibit No. 37) (stating that Brighton will not review further plans until its past fees and costs are paid); October 26, 1999 letter from Scott A. Hagen to James K. Tracy (Trial Exhibit No. 38) (asking for payment of an additional $3,499.00 in fees). Ward did not understand or agree that payment of cost and attorney's fees was a part of the proposed conditional settlement. Testimony of Gregory M. Ward, Trial Transcript, Vol. II (R. 1751:457-58).[3] Ward understood that the proposed settlement incorporated by reference the terms of the October 28, 1998 letter and the February 22, 1999 letter and that Brighton would not approve his plans if he did not correct his plans as suggested by Brighton. Testimony of Gregory Ward, Trial Transcript, Vol. II (R. 1751:495-96).

Issue 2: Whether the trial court erred in allowing Brighton to pave a private roadway across Ward's property

Brighton's Motion to Enforce Settlement Agreement included a request that Brighton be allowed to pave the gravel roadway running across Ward's property. (R. 1197-99). The trial court had found in 1994 that the purpose of the restrictive covenants, including the Property Use Agreement, was

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[3]Ward made clear that his reference to a "settlement agreement" at trial was in recognition of the trial court's ruling, and that he was not conceding that he believed the conditional proposed settlement was in reality a binding settlement agreement. (R. 1751: 454).

> to preserve the private nature of plaintiff's cabin and the rustic nature of the surrounding lands, including the Subject Property [and] to limit the intrusion of high traffic . . . from the Subject Property . . . .

October 4, 1994 Order at ¶ 8 (R. 312).

Ward agreed that if the parties were able to settle this matter and Brighton approved his plans, Brighton could pave the gravel roadway. March 3, 1999 Transcript at 15 (R. 1745:15) (Mr. Jardine stated that "[i]t's our understanding that if this goes through, we [Brighton] would pave the road."). On August 5, 1999, Brighton's counsel wrote to Ward's counsel as follows regarding pavement of the roadway:

> We also recognize that the Property Use Agreement refers to the roadway easement as a "gravel" roadway. Accordingly, we agree that until the issue is resolved, as a practical matter, Brighton can pave the road this year only with your client's agreement.

August 5, 1999 letter from Scott A. Hagan to Douglas J. Parry (attached as Exhibit B to Ward's Objection to Order Allowing Plaintiff to Pave Private Roadway) (R. 1360).

A scheduling conference was held on September 8, 1999. At that time, Ward's counsel was not aware that Brighton had filed the Motion to Enforce Settlement Agreement, with the accompanying request to pave the road across Ward's Property.[4] Affidavit of Douglas J. Parry (Exhibit H to Ward's Petition for Emergency Extraordinary Writ) ("Parry Aff.") at ¶¶ 10-12. At the scheduling conference, Brighton informed the court that it had filed the motion a few days earlier. The trial court granted the motion

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[4]September 3, 1999, the date the motion was filed, was the Friday prior to the Labor Day weekend. Brighton served the motion by mail, and with there being no mail delivery on Labor Day, Ward's counsel did not receive the motion until after the scheduling conference on September 8, 1999. Parry Aff. at ¶¶ 10, 12.

allowing pavement of the roadway over Ward's objection that he had no notice or an opportunity to be heard on the matter. Id. at ¶¶ 11, 13; September 21, 1999 Order (R. 1392-94).

Ward sought an extraordinary writ from this Court to prevent pavement of the roadway on his land. However, Brighton paved the roadway before this Court could act on the petition. See October 18, 1999 Remand Motion Results, Case No. 990845 (denying Petition for Extraordinary Writ because "issue raised is moot inasmuch as the road has already been constructed.").

Issue 3: Whether the trial court erred in granting Brighton's summary judgment motion

a. Brighton's evidence. Brighton reviewed plans submitted by Ward on several occasions. On each occasion, Brighton disapproved the plans. Affidavit of Mary M. Barton ("Barton Aff.") at ¶ 2 (R. 871-73). Mary Barton stated in her affidavit that one consistent problem on each occasion was that the plans submitted by Ward "were ambiguous, making it impossible to determine with confidence whether the plans were compliant." Id. at ¶ 3. At the first hearing in this case in 1994, the trial court found that Ward's plans were intentionally ambiguous. Judge's Ruling, September 7, 1994 (R. 1742:4). Mr. Ward continued to submit plans that Mary Barton deemed to be "incomplete and ambiguous, and that make only slight changes from versions already rejected." Barton Aff. at ¶ 6. Brighton's costs for legal counsel, and other costs incident to its review of Mr. Ward's plans had exceeded $60,000." Id. at ¶ 5.

b. Ward's evidence. After the trial court upheld Brighton's rejection of Ward's plans on October 4, 1994, Ward subsequently submitted to Brighton revisions of those plans to Brighton on October 26, 1994 and March 9, 1995. (See July 13, 1995 Hearing Exhibits Nos.1, 4). Ward's plans were filed with and approved by Salt Lake County as meeting all county building and zoning requirements. See July 13, 1995 Hearing Exhibit 15. John J. Saunders, a certified plan reviewer, reviewed Ward's plans and determined that the plans were "clear and can be easily understood to 'the proposed placement, plans and design' per the warranty deed for plan approval." (July 13, 1995 Hearing Exhibit 15, p. 6). Brighton did not approve Ward's plans.

Thereafter, Ward submitted additional plans for approval to Brighton, namely, the Classic Plan, the Cottage Plan, and the Chalet Plan. The Cottage Plan and Chalet Plan were also submitted to and approved by Salt Lake County. See Certificate of Custodian of Records (Exhibit D to Memorandum in Opposition to Motion for Summary Judgment) (R. 921-22). The Chalet Plan was resubmitted to Salt Lake County in 1998 (the "Revised Chalet Plan") and approved once again by Salt Lake County. Certified Letter of Public Record (Exhibit E to Memorandum in Opposition to Motion for Summary Judgment) (R. 921-22). Salt Lake County officials certified that Ward's plans met all applicable requirements of the Wasatch Canyon Master Plan, Wasatch Canyon Development Standards, the Foothills and Canyons Overlay Zone ("FCOZ"), and all land use and zoning requirements of Salt Lake County. Certified Letter of Public Record (attached as Exhibit E to Ward's Opposition to Motion for Summary Judgment) (R. 921-22).

Kimble Shaw testified that he reviewed the Designer, Cottage, and Chalet Plans, and "in my opinion find them to be clear and unambiguous." Affidavit of Kimble Shaw at ¶¶ 5-6, 10 (attached as Exhibit J to Memorandum in Opposition to Motion for Summary Judgment) (R. 956-57). Shaw also testified that it is an "acceptable architectural practice for a licensed architect to design a structure and have a draftsmen draw the working drawings." Id. at ¶ 11. Salt Lake County had determined that because FCOZ was enacted after a site plan for Ward's property had been approved, the property was not subject to FCOZ. See August 11, 19998 Certified Letter of Public Record from William A. Marsh, Salt Lake County Development Services Division (R. 924).

Issue 4: Whether the trial court erred in refusing at trial to consider the latest set of plans submitted to Brighton by Ward

On October 22, 1999, the trial court granted Brighton's Motion to Enforce Settlement Agreement and ordered that "the issue to be decided at trial on November 17, and 18, 1999, is whether the plans submitted by Ward after the hearing on March 3, 1999 complied with the criteria stated in the March 3, 1999 stipulation and incorporated letters." November 3, 1999 Order (R. 1417-18 at ¶ 3). After the March 3, 1999 stipulation regarding the proposed settlement, Ward, through Kimble Shaw, submitted the April 1999 Plans and the June 1999 Supplements to Brighton for review. (R. 1751:348-49). Brighton rejected the plans. See June 23, 1999 letter from James S. Jardine to Douglas J. Parry (Trial Exhibit No. 13).

After submitting the April 1999 Plans to Brighton, Ward received a memorandum from Brighton's architect, Neil Richardson, making comments on the plans. Trial Transcript, Vol. II (R. 1750:349); Trial Exhibit No. 5. Shaw was in the process of incorporating Richardson's comments into the April 1999 Plans when he was told to stop because Ward believed that Brighton was not acting in good faith and this matter could not be settled. Trial Transcript Vol. II (R. 1751:363-64). However, Shaw subsequently made the revisions requested by Richardson, as well as changes aimed at meeting Brighton's concerns expressed in its June 23, 1999 letter. These changes were included in the plans dated August 23, 1999. Trial Transcript Vol. II (R. 1751:366); Trial Exhibit No. 27). These plans were submitted to Brighton for review on October 6, 1999.[5] See Trial Exhibit No. 29; Trial Transcript Vol. II (R. 1751:473). 1751:473-74).

On October 11, 1999, Brighton informed Ward that it refused to review the plans submitted on October 6, 1999, because it wanted to wait until the trial court decided its pending Motion to Enforce Settlement Agreement and also because it would not review any additional plans unless Ward paid the costs and expenses, including attorney's fees, associated with Brighton's review of the plans submitted in April and June. See October 11, 1999 letter from Scott A. Hagen to Douglas J. Parry (Trial Exhibit No. 37) (requesting payment of $5,446.50 in attorney's fees).

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[5]These plans were dated August 23, 1999, but submitted on October 6, 1999. Page one of the plans is a Site Plan. The Site Plan was modified slightly on November 9, 1999, and delivered to Brighton on November 11, 1999. These plans were introduced as Trial Exhibit No. 27 and are referred to as the "October 1999 Plans."

On October 26, 1999, after the trial court granted Brighton's Motion to Enforce Settlement Agreement, Brighton sent Ward a letter stating as follows:

> . . . we believe that the plans that will be litigated at trial are those Mr. Ward submitted on April 9, 1999 and resubmitted, with corrections, on or about June 16, 1999. Due to the upcoming trial date, we need clarification of this issue immediately. Please let us know before the end of the week if you are going to contend that any other set of plans will be litigated at trial.

October 26, 1999 letter from Scott A. Hagen to Douglas J. Parry (Trial Exhibit No. 30).

On November 1, 1999, Ward's counsel informed Brighton that the latest set of plans submitted to Brighton on October 6, 1999 would be litigated at

> With regard to Scott's October 26, 1999 letter requesting clarification of which plans will be litigated at trial, it seems clear that the plans will be the latest plans submitted to you. Mr. Ward submitted plans to Brighton Corporation in accordance with the terms of the proposed settlement agreement. Mr. Ward made revisions to those plans in response to your objections and concerns. These revisions are contained in the plans that we delivered to you on October 6, 1999. If you eventually decide to review those plans and notify us of any items that you believe are still deficient, Mr. Ward reserves the right to try to correct these deficiencies prior to trial.

November 1, 1999 letter from James K. Tracy to James S. Jardine (Trial Exhibit No. 39).

Brighton continued to refuse to review the latest set of plans. At trial, Brighton argued that the only issue for trial should be whether the plans submitted in June 1999 complied with the settlement agreement that was ruled to exist by the trial court. Trial Transcript, Vol. 1 (R. 1750:14-16). The Court ruled that it would not consider the October 1999 Plans because Brighton had not reviewed them. Id. at 1750:32-50; February 3, 2000 Order (R. 1690-91) (ruling that "Brighton correctly determined that the

plans submitted in October 1999 were not properly presented for review and did not review them. Accordingly, those plans were not considered during the trial.").

Shaw stated that he did not regard the April, June, or October plans as "final plans." Trial Transcript, Vol. II (R. 1751:419). However, Shaw's statement that these were not "final" plans must be considered in tandem with his testimony that all of the information requested by Brighton was on the plans (R. 1751:350, lines 8-14). The plans were not "final" only in the sense that Shaw indicated that he was willing to work with Brighton on any changes that they might request. (R. 1751:344). Ward clarified this issue when he testified that "if Brighton Corporation would approved those plans, then they'd be final plans." (R. 1751:501). However, because Brighton did not approve the plans, Ward continued to make changes which were included in the October Plans. (R. 1751:501-02). Ward submitted the October Plans "hoping to get a final review and approval from Brighton . . . in hope to settle and finally resolve this matter." (R. 1751:474).

Brighton refused to review the October 1999 Plans because Ward had not paid Brighton's attorney's fees for prior review of plans. See Trial Transcript, Vol. II (R. 1751:285) (Court understood that Brighton refused to review October 1999 Plans because Ward had not paid for Brighton's prior review of the other plans. Mr. Jardine confirmed that "that's our position your Honor."). The trial court apparently agreed with this position, stating that Brighton "should not be required to incur more of those costs before some reimbursement is made back to them." Trial Transcript, Vol. II (R. 1751:290).

Issue 5: Whether the trial court erred in ruling at the trial of this matter that Brighton properly rejected Ward's plans

At trial, Brighton claimed that it rejected Ward's plans because of deficiencies listed on Trial Exhibit No. 14. See Trial Transcript, Vol. 1 (R. 1750:74) (referring to Exhibit 14, Mary Barton testified that "Yes. That's what we decided that it did not comply with."). The evidence regarding the specific points claimed by Brighton to be deficient, along with the evidence presented by Ward that the plans were sufficient, is set forth below:[6]

1. The drawings of the north main entrance. See Trial Exhibit No. 14, ¶¶ 1, 7.

a. **Brighton's evidence.** The October 28, 1998 and February 22, 1999 letters state that prior plans of the north main entrance to the cabin were not sufficiently detailed, requested contour lines and exact elevations, and "suggested" that the entrance be located on the east side or the west side of the cabin. Trial Exhibits Nos. 2 and 3. Mary Barton testified that the June 1999 Supplements submitted by Ward were not sufficiently detailed and that Brighton "didn't get a plan showing the front porch. (R.1750:80). She further indicated that a dotted line that showed existing grade and a heavy black line showing the grade after construction of the porch were insufficient. (R. 1750:81; 100-01). Mary Barton wanted exterior elevation drawings that showed "how the cabin was built into the slope of the mountain." (R. 1750:101).

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[6]The items in Exhibit 14 are not restrictions found in the Special Warranty Deed. Consequently, if there is no settlement agreement between the parties, none of these requirements would have been at issue at the trial.

Mary Barton was concerned that the plans showed a retaining wall on the northeast side of the cabin, but there was "no retaining wall or no grading or anything shown to the north side." (R. 1750:82). However, she could tell that Ward intended to make a "deep cut" and that was the basis on which she concluded the plans were insufficient regarding the north porch. (R. 1750:83). Mary Barton relied on her architect, Neil Richardson, to determine the adequacy of the plans. (R. 1750:142).

Richardson did not testify that the "heavy black line" was insufficient. Richardson testified that the retaining wall to the east of the porch was too close to the limit of disturbance line and that there were no dimensions called out on the wall. (R. 1750:168-69). He also believed that there was not sufficient detail to determine what grading would be done over the waterline. (R. 1750:172-73)

b. Ward's evidence.[7] Kimble Shaw, Ward's architect, testified that the north porch was shown on three detailed drawings. First, the site plan (Trial Exhibit No. 17) showed "existing grades, grades that are being moved, and the existing grade before construction. This included a drawing which showed the "retaining wall that hold backs the earth." Trial Transcript, Vol. II (R. 1751:357). Second, the floor plan (Trial Exhibit No. 18) showed a "quarter-inch scale plan of the front entry." (R. 1751:357). Finally, the elevation drawings (Trial Exhibit No. 20) give an elevation view of the front entry porch and "call out" the retaining wall. (R. 1751:357). The June 1999 Supplements also

[7]During trial, Brighton stipulated that Mr. Ward believed that he had complied with every requirement raised by Brighton at trial. Trial Transcript, Vol. II (R. 1751:482).

showed detailed information regarding the north porch. See Trial Exhibits No. 10 ("Site Sections"), No. 11 ("Floor Plans"), and No. 7 ("Elevations").[8]

2. Ward's plans referred to easements as "new" and "proposed." Trial Exhibit No. 14, ¶ 2.

a. Brighton's evidence. Ward had agreed that if the parties settled this matter, he would "agree that there is an 18-foot easement for the waterline." Transcript of March 3, 1999 hearing at 10, lines 23-25 (Trial Exhibit No. 1). The October 28, 1999 letter stated that "[t]he existence and present location of Brighton Corporation's waterline and easement must be confirmed so there is no future dispute about it." October 28, 1999 letter (Trial Exhibit No. 2). Ward's plans showed the 18-foot easement, but described it as a "new"and "proposed" easement. The words "new" and "proposed" on the plans "troubled" Mary Barton. Trial Transcript, Vol. 1 (R. 1750:85, 147).

b. Ward's evidence. The plans show the easement that would be acknowledged by Ward once the parties settled this case. See Site Plans (Trial Exhibits Nos. 6, 17, and 27). In addition, Mary Barton admitted on cross-examination that the waterline had previously been on top of the ground and had been buried and extended by Brighton from its original position. (Trial Transcript, Vol. 1 (R. 1750:142-43).[9]

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[8]As is discussed more fully below, Carl Eriksson was going to testify that Ward's drawings were "as clear and detailed as any plans he has seen." Memorandum in Support of Motion to Reconsider Disallowance of Testimony of Carl Eriksson (R. 1537 at ¶ 5). Mr. Eriksson was also going to testify that the grading was adequately shown on the plans. Id. Judge Young refused to allow Carl Eriksson to testify on behalf of Ward.

[9]The Special Warranty Deed only allowed Brighton a "permanent waterline

(continued...)

3. Location of Ward's sewer line. Trial Exhibit No. 14, ¶ 3.

The October 28, 1998 letter requests that Ward run his sewer line "along the west end of his property." Trial Exhibit No. 2 at p.3. On the April 1999 Plans and the June 1999 Supplements, Ward showed the sewer line running through the middle of the property where there was an existing road. See Trial Exhibit Nos. 6, 17. This was where the Solitude Improvement District contemplated that the sewer would run. See Testimony of William G. Lapsley, Trial Transcript, Vol. II (R. 1751: 326-27). Mary Barton testified that this was a ground for rejecting the plans. (R. 1750:89). After the trial court ruled that the language in the October 28, 1998 letter was a binding settlement agreement, Ward revised the plans to show the sewer line running on the west side of the property. See Trial Exhibit No. 27; Trial Transcript, Vol. II (R. 1751:479-80).

4. South side patio's compliance with the Foothills Canyons Overlay Zone. Trial Exhibit No. 14, ¶ 4.

a. Brighton's evidence. The February 22, 1999 letter states that a retaining wall of more than six feet would violate the standards set out in the Foothills Canyons Overlay Zone ("FCOZ"). Trial Exhibit No. 3 at ¶ 3. Brighton "suggested" that Ward reduce the size of the patio or step down the patio in compliance with FCOZ. Id. FCOZ provides that a retaining wall used to support steep slopes "shall not exceed six feet in height from the finished grade," except where the wall is terraced between two tiers of not

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[9](...continued)
easement as the same now exists," i.e., existed on July 3, 1991. The updated survey showed that not only was the waterline lowered and extended, it was also moved north.

more than four foot tiers. Trial Exhibit No. 15 (pertinent portions of FCOZ are attached to the Addendum as Exhibit N). Mary Barton testified that she believed the plans submitted by Ward contained a retaining wall on the southeast side of the cabin that was in excess of six feet high. Trial Transcript, Vol. I (R. 1750:95-97). Her architect, Neil Richardson, testified that he was generally familiar with FCOZ (R. 1750:155), and that even with the proposed tiered system, the "corners of that wall exceed that step [i.e., allowable under the FCOZ requirements]." (R. 1750:164-65).

b. Ward's evidence. By tiering the retaining wall with a planter box, the corners of the retaining wall were less than six feet and did not violate FCOZ. See, e.g., Trial Exhibit No. 7. The step design of the retaining wall left a retaining wall height of about five and one-half feet at the end of the step. Testimony of Gregory M. Ward, Trial Transcript, Vol. II (R. 1751:514-15). Architect Kimble Shaw also testified that by terracing the retaining wall with a "triangulated planner," the retaining wall satisfied FCOZ. Trial Transcript., Vol. II (R. 1751:378). Salt Lake County had approved the plan design as complying with all county requirements, including FCOZ. See Testimony of Gregory M. Ward, Trial Transcript, Vol. II (R. 1751:515).[10]

5. Updated survey and transparency of survey. Trial Exhibit No. 14, ¶ 8.

a. Brighton's evidence. The October 28, 1998 letter requested that Ward include with his plans a copy of the original Francom survey and include a transparent copy of the Sneidman survey. Trial Exhibit No. 2, at p.5. On March 3, 1999, James S.

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[10]Carl Eriksson was also going to testify that the plans complied with FCOZ.

Jardine indicated that Ward would provide an updated survey addressing "in detail what are called 'areas of disturbance.'" March 3, 1999 Transcript (R. 1745:5). Mary Barton testified that she never received a transparency of the Sneidman survey. Trial Transcript, Vol. 1 (R. 1750:104). Richardson believed that the drawings did not accurately show existing conditions. Trial Transcript, Vol. I (R. 1750:160). He noted that there were trees shown in the road that goes through the property. (R. 1750:161). In addition, a circular driveway was not shown on the survey. (R. 1750:162). Richardson asked that all trees with a three inch or greater diameter be shown on the survey. Trial Exhibit No. 5.

b. Ward's evidence. Greg Ward testified that because of heavy snows in Brighton canyon, a surveyor was not able to conduct an updated survey until "mid-June" 1999. Testimony of Gregory M. Ward, Trial Transcript, Vol. II (R. 1751:467). The survey was updated on June 19, 1999, and again on October 6, 1999, and submitted to Brighton. See Trial Exhibit No. 46. Ward also testified that he already given Brighton a copy of the requested transparency and that Brighton had never asked for another copy. Trial Transcript, Vol. II (R. 1751:486-88).

6. Correction of "support documents". Trial Exhibit No. 14, ¶ 11.

a. Brighton's evidence. Mary Barton saw copies of "support documents" that had been filed by Mr. Ward with Salt Lake County with a prior application for a building permit. Trial Transcript, Vol. I (R. 1750:105). The October 28, 1998 letter states that Brighton wanted Ward to correct those support documents, and submit a copy to Brighton for approval. Trial Exhibit No. 2 at p.6. The letter does not state what was to be

corrected on the "support documents." Id. Barton testified at trial that she never received a corrected copy of the documents. Trial Transcript, Vol. I (R. 1750:105).

b. Ward's evidence. Ward testified that when his plans were approved by Brighton, he intended to withdraw all "support documents" from the county and that he would not submit support documents with his building permit application in the future. Testimony of Gregory M. Ward, Trial Transcript, Vol. II (R: 1751:533-34).

7. Submission of color board. Trial Exhibit No. 14, ¶ 12.

a. Brighton's evidence. The October 28, 1998 letter requested a "color board for exterior finish." Trial Exhibit No. 2 at 6. Mary Barton testified that she did not receive a copy of this color board with the June 1999 Supplements. Trial Transcript, Vol. I (R. 1750:106). She later testified that she had received color boards, but thought that she received several different color boards. (R. 1750:131-32).

b. Ward's evidence. Mary Barton admitted that she may have received the color board with a prior set of plans. (R. 1750:126-27). Ward testified that he had previously given Brighton the color chart admitted as Trial Exhibit 16 and a color board admitted as Trial Exhibit 56, and that Brighton had not indicated in its response to the April 1999 Plans or the June 1999 Supplements that another color board was required. Testimony of Gregory M. Ward, Trial Transcript, Vol. II (R. 1751:446-47, 489-90).

8. Withdrawal of all prior plans from the county. Trial Exhibit No. 14, ¶ 15.

It was undisputed that Ward had not yet withdrawn any prior plans from Salt Lake County. Ward testified that he intended to withdraw such prior plans after Brighton had

approved his plans. Testimony of Gregory M. Ward, Trial Transcript, Vol. II (R. 1751:533). Mary Barton agreed, testifying that Mr. Ward would withdraw his prior plans at the time he filed approved plans. Testimony of Mary Barton, Trial Transcript, Vol. I (R. 1750:117) (Q. "Just that the settlement agreement was that whatever plans were on file with the county that Mr. Ward had filed, he would withdraw at the time he file the Brighton approved plans?" A. "Yes.").

Issue 6: Whether the trial court erred in refusing to allow Ward's expert witness, Carl Eriksson, who was also a fact witness, to testify at trial

Ward attempted to call Carl Eriksson to testify at the trial of this matter, both as an expert witness and a fact witness. There was no dispute as to Mr. Eriksson's qualifications as an expert. See Carl Eriksson Resume (Trial Exhibit No. 31). He had approximately 26 years of experience in engineering and reviewing building plans for compliance with building codes and zoning ordinances. (R. 1750:221). He had been employed by Salt Lake County for approximately 16 years, where he was responsible for plan review, including engineering and zoning issues. (R. 1750:219-20).

Neil Richardson, who testified as to whether Ward's plans complied with FCOZ, stated that he was "generally familiar" with the zoning ordinance. Testimony of Neil Richardson, Trial Transcript, Vol. I (R. 1750: 155). On the other hand, Carl Eriksson testified that he was intimately familiar with FCOZ, and in fact, assisted in drafting those requirements and had been responsible to direct the implementation of their requirements since their inception. Testimony of Carl Eriksson, Trial Transcript, Vol. II (R. 1751: 221-

22). He had, in his career, personally inspected approximately 100 building plans for compliance with FCOZ. (R. 1751:223).

Brighton's counsel conducted voir-dire of Mr. Eriksson, who testified that he had only reviewed "small parts" of the Transcript of the March 3, 1999 hearing, the October 28, 1999 letter, the February 22, 1999 letter, and the checklists (Trial Exhibit Nos. 1-4). (R. 1750:223-34). Based on that fact, the trial court excluded Mr. Eriksson from testifying at the trial.

In a motion to reconsider argued during the trial, Ward proffered that the anticipated testimony of Carl Eriksson would include the following: (1) Ward's plans submitted in April 1999 and October 1999 contained all the required components of a building plan; (2) Salt Lake County had already approved the design set forth in the April 1999 and October 1999 building plans as complying with FCOZ; (3) it is impossible for the cabin in this case to be built at a main floor elevation of 116.83 feet and at the same time have the cabin "on-grade" on the west side. Building the cabin at a main floor elevation of 116.83 feet results in the cabin being <u>below</u> grade on the west side, which is not preferred; (4) the plaintiff's contention in paragraph 1 of Exhibit 14 that Mr. Ward has not provided detailed drawings of north main entrance is without merit. The drawings were as clear and detailed as any plans he had ever seen. The elevation drawings clearly show the existing grade and clearly show how the cabin relates to that existing grade; (5) Ward's grading/draining plan is more detailed than most plans submitted to the County; (6) the plaintiff's contention that the grading might effect their waterline was without

merit; (7) the patio on the south side of the cabin complies with FCOZ; and (8) the plans submitted by Mr. Ward in April 1999 and June 1999 are sufficiently detailed that the cabin could be build without any information other than what was included on the plans. Memorandum in Support of Motion to Reconsider Disallowance of Testimony of Carl Eriksson (R. 1537-44). See also Trial Transcript, Vol. II (R. 232-271) (oral argument on motion to reconsider).

Issue 7: Whether the trial court erred in denying Ward's application for determination that consent to build the cabin had been unreasonably withheld after the July 13, 1995 evidentiary hearing

In October 1994 the trial court entered a preliminary injunction against Ward enjoining Ward from constructing a cabin on his property without the express approval of Brighton, but stated that "[i]n the event that defendants submit new and different proposed plans to plaintiff, which plans are then disapproved, defendants may apply to this Court for a determination of whether approval has been unreasonably withheld." October 4, 1994 Order at ¶ 20 (R. 315).

As stated above, Ward subsequently submitted revised plans to Brighton for approval. Brighton refused to approve the plans and the trial court held a hearing on July 13, 1995 to determine whether Brighton had unreasonably withheld approval of the plans. The evidence presented by Ward and Brighton at that hearing is set forth below.

a. Brighton's evidence. The proposed design contained a second floor ceiling which could be converted to a loft. Affidavit of Neil W. Richardson at ¶ 9(b) (July 13, 1995 Hearing Exhibit 16) (hereinafter "Richardson Aff."). The plans called for

a roof pitch of 8/12. According to Neil Richardson, the preferred Alpine design in Utah is to retain snow on the roof with a 3/12 pitch.[11] Richardson Aff. at ¶ 9(a).

Neil Richardson stated that the elevations shown on the proposed plans and the model were different than a topographical map previously provided to him and the renderings were ambiguous in that either the main floor would be three to four feet or more above 8812', and therefore significantly above grade on the west, or else the entrance on the north and windows on the east would be below grade, contrary to the renderings. Richardson Aff. at ¶ 9(c). Finally, Richardson did not believe that the plans met the Wasatch Canyons Development Standards (the "Standards") because the design called for the main floor of the cabin to be above-grade and required excessive cuts that conflicted with the Standard's objectives. Richardson Aff. at ¶ 10(b).

b. Ward's evidence. Ward reviewed the trial court's October 4, 1994 order and made changes to his proposed plans in order to conform with that order. Testimony of Gregory M. Ward, Transcript of July 13, 1995 Hearing (R. 1753:20). Ward put the cabin on grade on the west side. (R. 1753:21). In addition, Ward completely eliminated the basement by putting the main floor on slab concrete. (R. 1753:21). The loft was also

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[11]It should be noted that at trial, Neil Richardson contradicted his own testimony at the July 13, 1995, hearing by testifying that there is not a preferred alpine pitch design. Testimony of Neil Richardson, Trial Transcript, Vol. I (R: 1750:187) (testifying that there are two acceptable theories, one to hold snow on the roof and the other to allow it to slide off). Further, as Ward's counsel made clear at the hearing, Brighton raised the issue regarding the pitch of the roof for the first time at the hearing, having never before discussed this issue with Ward or his counsel. July 13, 1995 Transcript (R. 1753:75).

completely eliminated. (R. 1753:21). The attic was now designed so that it was incapable of holding live loads. (R. 1753:21).

Ward changed the roof pitch of his cabin from 9/12 to 8/12. (R. 1753:21-22). The first floor on the proposed cabin was built back into the hill very similar to Mary Barton's cabin. (R. 1753:22-23). The plans were redrawn to ensure that each floor was below 1,200 square feet. (R. 1753:23).

The overall height of the cabin was reduced by around 10 or 11 feet from the original plans rejected in 1994. (R. 1753:24). The top of Ward's proposed cabin was three feet below the building grade of Mary Barton's cabin, and the proposed cabin was 100 to 120 feet from Mary Barton's cabin. (R. 1753:26). From the east side–the side facing Mary Barton's cabin–the proposed cabin gave the appearance of being only one story and pushed into the hill. (R. 1753:40-41).

William A. Marsh III, a Manager of Salt Lake County's Development Services Division, testified that "[t]he plans submitted by Gregory Ward, which have been approved, conform with the Wasatch Canyon Development's Standards as applied by the county in connection with this type of residential development." Affidavit of William A. Marsh III at ¶ 7 (R. 457). See also July 13, 1995 Hearing Exhibit 15, p.3 (the plans met all county zoning requirements and were approved by Salt Lake County Planning and Zoning). Finally, John J. Saunders, a certified plan reviewer, stated that the plans were clear in their presentation and can be easily understood for an approval process regarding "the proposed placement, plans and design." (July 13, 1995 Hearing Exhibit 15, p.6).

Issue 8: Whether the trial court erred in not recusing Judge David S. Young for bias and prejudice and whether the Supreme Court should order that Judge David S. Young be recused from this action for bias and for denying Ward his due process rights throughout the proceedings below

In 1996, while this case was pending, Judge David S. Young was engaged in a hotly contested retention election. Affidavit of Gregory M. Ward in Support of Motion Requesting Recusal and Reassignment at ¶ 1(R. 659). Judge Young succeeded in his retention election by a very narrow margin, reported to be just "barely 50 percent" of the vote. Id. at ¶ 2 (R. 660). During the course of the retention election campaign, large display ads were published in local newspapers publicly soliciting votes in favor of Judge Young's retention. These ads were run on several dates in October and November 1996. Id. at ¶ 3 (R. 660); see also Exhibit 2 to Affidavit of Gregory M. Ward in Support of Motion Requesting Recusal and Reassignment (R. 671).

The ad in the newspaper listed individuals who proclaimed their public support for Judge Young. Affidavit of Gregory M. Ward in Support of Motion Requesting Recusal and Reassignment, at ¶ 4 (R. 660). The list of individuals included James S. Jardine, lead counsel for plaintiff, and approximately 25 attorneys from the law firm of Ray, Quinney & Nebeker, which represented plaintiff in this action. Id. at ¶ 6 (R. 660).

As a defendant before Judge Young, Ward had a reasonable concern about Judge Young's ability to be completely impartial, knowing that plaintiff was represented by James S. Jardine and Ray, Quinney & Nebeker, who played such a high profile and

publicly advertised role in Judge Young's closely contested retention election campaign while this case was pending. Id. at ¶ 7 (R. 660).

On May 16, 1997, before any hearings had been held in the case since the retention election, Ward filed a Motion Requesting Recusal and Reassignment. (R. 651-53). Judge Young refused to recuse himself and the matter was referred to Judge Leslie A. Lewis in accordance with Rule 63(b), who denied the motion. June 9, 1997 Court's Ruling (R. 719).

From very early in these proceedings, and especially after Ward sought Judge Young's recusal, Judge Young has exhibited unfairness, amounting to actual bias, in favor of Mary Barton and Brighton Corporation. For example, at the hearing on July 13, 1995, the court allowed opposing counsel to offer an uninterrupted opening statement. Transcript of July 13, 1995 Hearing (R. 1753:5-10). When counsel for Ward gave an opening statement, the court interrupted several times, challenging the proposed plans before any evidence regarding the plans had been presented. (R. 1753:11, 12, 13-14). Before Ward's counsel had even finished his opening statement, and before any evidence had been heard regarding all the changes that had been made to the plans, the court stated: "it strikes me that it isn't a good faith effort to try to redesign a cabin if you only make a 9 foot difference." (R. 1753:12). Ward's counsel responded to each one of the court's challenging statements and the court finally stated: "Well, go ahead and present your evidence and I'll sit and hear it." (R. 1753:16).

Despite the fact that the very purpose of the July 13, 1995 hearing was to determine whether Brighton was unreasonably withholding approval of Ward's plans, the court stated at the end of the hearing that "[it] didn't know whether [plaintiff] was being picky about the kinds of things that [plaintiff was] expecting [Ward] to do in [his] cabin or to build in [his] cabin." (R. 1753:71). Nevertheless, the court proceeded to rule that Ward's plans did not adequately comply with the requirements of the Special Warranty Deed, but failed to state how the plans failed to comply. (R. 1753:76).

Ward submitted a number of revised plans as set forth above, always complying with the "two floors" and "1,200 square feet" requirements. Nevertheless, Brighton Corporation refused to approve the plans. In order to attempt to salvage the 1996 building season, Ward requested an expedited hearing an another motion for a determination by the court whether Brighton had unreasonably withheld approval. (R. 468-70). The court refused to hear Ward's motion. June 5, 1996 Minute Entry (R. 611).

On December 22, 1998, James Jardine, on behalf of plaintiff, filed the summary judgment discussed above. On December 23, 1998, the court held a scheduling conference. At that time, Ward's counsel had not had an opportunity to even review the summary judgment motion. Affidavit of Douglas J. Parry ¶ 3 (Exhibit H to Gregory M. Ward's Petition for Emergency Extraordinary Writ). At the conclusion of the scheduling conference, Brighton's counsel informed Judge Young of the summary judgment motion. Judge Young stated that he was inclined to grant the motion before he had an opportunity to review the motion and before Ward had an opportunity to respond to the motion. Id.

Ward's counsel objected on the ground that Ward had not had an opportunity to respond, and Judge Young said that Ward could go ahead and file an opposition, but the court was nevertheless inclined to grant the motion, which it did. Parry Aff. at ¶ 4.

As set forth above in detail in the Statement of Facts relating to Issue No. 2 (relating to the pavement of the road), on September 8, 1999, Judge Young ruled that Brighton could pave the roadway over Ward's Property without giving Ward any notice or a fair opportunity to be heard. Parry Aff. at ¶¶ 10, 12.

Judge Young's biased rulings continued at trial. As detailed above, Judge Young refused to consider the October 1999 Plans because Brighton had not reviewed them, even though his own ruling, issued October 22, 1999, stated that the issue for trial would be whether the plans submitted by Ward after March 3, 1999 complied with the settlement agreement. Judge Young allowed Brighton' witness, Neil Richardson, who stated that he was "generally familiar" with the zoning ordinance, to testify at trial regarding whether Ward's plans complied with FCOZ, but would not allow Ward's expert, Carl Eriksson, to rebut this testimony, even though Eriksson was more familiar with the statute and its application than Neil Richardson.

SUMMARY OF ARGUMENT

Brighton has unreasonably refused to approve Ward's plans to build a cabin on his Property for the last six years, despite the fact that Ward's plans have met the requirements in the Special Warranty Deed that the cabin have only two floors of no more than 1,200 square feet per floor . The trial court has facilitated and upheld Brighton's

refusal to approve plans even though Ward has complied with the restrictive covenants and submitted plans that any reasonable person would approve (and which in fact were approved by Salt Lake County).

The threshold issue in this case is whether the parties entered into a binding settlement agreement on March 3, 1999. This issue will determine what standard should be applied in reviewing Ward's plans. The record clearly establishes that the parties informed the trial court of a proposed settlement, but that the settlement never was accomplished. The proposal contemplated that Ward would resubmit plans which addressed issues raised by Brighton in an October 28, 1998 letter and a February 22, 1999 letter. The parties agreed that any settlement must include "approved plans." Therefore, there could not be any settlement without plan approval and it is undisputed that Brighton never approved any plans. The March 3, 1999 transcript is replete with references to the proposed nature of the settlement. The fact that the trial court gave the parties a trial date at the end of April 1999 is further evidence that the case was not settled, but rather, that the parties were working towards a settlement. The trial court erred in ruling that the parties had entered into an enforceable contract and settlement agreement, the terms of which were not specifically identified, but were ruled to be contained in the October 1998 letter, the February 22, 1999 letter, the March 3, 1999 transcript, and two checklists. Such an agreement lacks sufficient definiteness to be enforced. In addition, the conduct of the parties after March 3, 1999, establishes that the parties did not reach a meeting of

the minds on key issues, including, but not limited to, the payment of attorney's fees and final approval of the plans.

The trial court erred in ruling on a summary judgment motion that (1) that Greg Ward must compensate Brighton for all costs, including attorney's fees, associated with any future review by Brighton of any new plans submitted by Ward; (2) that it was reasonable for Brighton to require a licensed architect to sign any plans for the cabin; and (3) that it was reasonable for Brighton to apply the Foothills and Canyons Overlay Zone ("FCOZ") ordinance of Salt Lake County in reviewing plans submitted by Ward. There were no such requirements in the operative Special Warranty Deed. In addition, the basis for Brighton's motion for summary judgment was Brighton's allegation that it was burdened by Ward's repeated submission of ambiguous plans. Ward controverted the assertion that the plans were ambiguous and therefore, the issue was not properly decided on summary judgment. The requirement to pay attorney's fees also violated the well-accepted rule that attorney's fees can be awarded only by statute or by contract.

Further, even if Brighton were entitled to attorney's fees based on the trial court's erroneous summary judgment order, if the parties actually entered into a settlement agreement as ruled by the trial court, Brighton compromised any right to attorney's fees as a part of that settlement.

As a part of Brighton's motion to enforce the settlement agreement, Brighton requested that the trial court allow it to pave a roadway across Ward's property. The Property Use Agreement prohibited the paving of the road. The trial court violated

Ward's due process rights by granting this motion before Ward's counsel had received the motion or had a fair opportunity to oppose the motion.

After March 3, 1999, Ward submitted plans to Brighton on April 9, 1999, June 16, 1999, and October 6, 1999. The October 6, 1999 plans incorporated specific changes requested by Brighton after it reviewed the April and June plans. Brighton wrongfully refused to review the October 6, 1999 plans, demanding payment of its attorney's fees for reviewing the April and June plans before it would review additional plans. On October 22, 1999, the trial court held that a settlement existed and that the issue at trial would be whether the plans submitted by Ward to Brighton after March 3, 1999 complied with the settlement. Thereafter, Brighton continued to refuse to review the October 6, 1999 plans.

The trial court ruled that Ward could not submit evidence of the October 6, 1999 plans at trial because Brighton had not reviewed the plans. Consequently, the entire trial on November 17-19, 1999, was on the issue of whether the earlier plans were sufficient, even though both parties acknowledged that the October 6, 1999 plans were the latest plans. The trial court violated its own order by refusing to consider the latest set of plans submitted by Ward to Brighton.

Additionally, the trial court erred in not allowing Ward's expert, Carl Eriksson, to testify that Ward's plans were clear, unambiguous, detailed, and complied with every requirement raised by Brighton at trial. The trial court also erred in ruling that Ward's plans were properly rejected by Brighton. Brighton raised eight objections to Ward's plans, each of which was adequately rebutted by Ward.

In 1995 Ward had submitted plans to Brighton which only had two floors and less than 1,200 square feet per floor. Brighton wrongfully rejected those plans. The court erred in not ruling that Brighton had unreasonably withheld approval of the 1995 plans.

Finally, the trial court erred in refusing to recuse Judge Young after James Jardine played a prominent and advertised role in Judge Young's 1996 retention election campaign. Judge Young has consistently prejudged this case and demonstrated actual bias against Ward, all in violation of Ward's due process rights to fair and unbiased hearings. The Supreme Court should order that Judge Young be recused from this case and that this case be reassigned to another district court judge.

ARGUMENT

Introduction

Ward's ability to build on his Property is governed by the restrictive covenants in the Special Warranty Deed, which require that Ward's cabin be limited to two floors with no more than 1,200 square feet per floor, and provide that Brighton has the right to review and approve Ward's plans, which approval "shall be timely and shall not be unreasonably withheld." Special Warranty Deed (Trial Exhibit No. 44).

This Court has explained that "restrictive covenants are not favored in the law and are strictly construed in favor of the free and unrestricted use of property." St. Benedict's Development Co. v. St. Benedict's Hospital, 811 P.2d 194, 198 (Utah 1991) "Generally, express restrictive covenants are upheld only 'where they are necessary for the protection of the business for the benefit of which the covenant was made and no greater restraint is

imposed than is reasonably necessary to secure such protection.'" Id. (quoting Allen v. Rose Park Pharmacy, 237 P.2d 823, 826 (1951)). It is axiomatic that where a restrictive covenant gives the grantor the right to restrict the free use of property by approving or disapproving construction plans, that right must be exercised reasonably and in good faith. See, e.g., Norris v. Phillips, 626 P.2d 717, 719 (Colo. Ct. App. 1980); McNamee v. Bishop Trust Co., 616 P.2d 205, 208 (Hawaii 1980). These limitations are intended to prevent the exercise of subjective, and unfettered discretion in disapproving plans. In this case, since 1995 the trial court has refused to constrain Brighton's discretion to that of an objectively reasonably person, and instead allowed Brighton to assert any subjective ground for disapproving Ward's plans, regardless of whether those grounds were supported by the evidence or were reasonable.

POINT I

THE TRIAL COURT ERRED IN DETERMINING THAT THE CONDITIONAL PROPOSED SETTLEMENT CONSTITUTED A BINDING AND ENFORCEABLE CONTRACT AND SETTLEMENT AGREEMENT

"Settlement agreements are governed by the rules applied to general contract actions." Sackler v. Savin, 897 P.2d 1217, 1220 (Utah 1995). A "trial court has the power to enter a judgment enforcing a settlement agreement if it is an enforceable contract." Goodmansen v. Liberty Vending Systems, Inc., 866 P.2d 581, 584 (Utah Ct. App. 1993). The proposed conditional settlement agreement in this case is not an enforceable contract for the following three reasons: (1) the proposed agreement constituted preliminary negotiations to which further manifestations of assent were

required; (2) there were never any plans approved, which was an essential condition of any settlement; and (3) the proposed agreement lacked sufficient definiteness to be enforced and the parties failed to reach a meeting of the minds on essential terms of the proposed agreement.

1. The proposed agreement constituted preliminary negotiations to which further manifestations of assent were required.

Preliminary negotiations do not constitute a binding contract. Sackler, 897 P.2d at 1221. This Court has explained, with regard to preliminary negotiations, as follows:

> A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

Sackler, 897 P.2d at 1221 (quoting Restatement (Second) Contracts, § 26 (1981)).

In this case, both parties made it clear that a settlement was conditioned on a "further manifestation of assent." Ward would further manifest his assent by submitting new plans to Brighton. Brighton would further manifest its assent to settlement by approving those plans. Brighton never approved the plans, i.e., never manifested its assent to the settlement. Consequently, no enforceable agreement was reached.

Although the parties exchanged correspondence regarding a proposed settlement for a number of months, it is clear that as of March 2, 1999, the parties had not reached any agreement. On that day, counsel for Brighton wrote to counsel for Ward, stating as follows: "In an effort to see if this matter can be settled prior to trial, I am writing to clarify our understanding of our discussions on a proposed settlement." March 2, 1999

letter from James S. Jardine to Douglas J. Parry (emphasis added) (attached as Exhibit E to Brighton's Memorandum in Support of Motion to Enforce Settlement Agreement) (R. 1256-58). See also Reply Memorandum in Support of Motion to Enforce Settlement Agreement (R. 1400) ("Brighton agrees that the proposal stated in the March 2, 1999 letter was only a proposal, i.e., it was not accepted on that day.").

Nor had any final settlement agreement been reached on March 3, 1999, when the parties informed the Court of their settlement discussions. As set forth above in the Statement of Facts, it is abundantly evident from the record in this case that the proposed settlement was a conditional settlement. As explained by Brighton's counsel at the outset of the March 3, 1999 hearing, "It, in fact, Your Honor, is a conditional settlement we'd like to read into the record. It's conditional because certain actions remain to be taken." March 3, 1999 Transcript at 3, lines 17-19 (R. 1745:3). Thereafter, as set forth in the Statement of Facts above, Brighton's counsel makes at least seven more references to the conditional nature of the proposal.

The fact that the parties asked for, and were granted, a trial date immediately after reading into the record the proposed agreement is compelling evidence that no final and binding settlement had yet been reached. If a settlement had been agreed upon, there would be no need for a trial date. In that event, the Court would have vacated the trial date rather than continue the trial date. See, e.g., Goodmansen v. Liberty Vending Systems, Inc., 866 P.2d 581, 585 (Utah Ct. App. 1993) (cancellation of a trial setting was "an act consistent with a settlement having been reached."); Zions First National Bank v.

Barbara Jensen Interiors, Inc., 781 P.2d 478, 479 (Utah Ct. App. 1989) ("The court also noted that, consistent with a settlement having been reached, the Jensen's depositions were cancelled and the trial date stricken by Zion.").

The parties did nothing more than present to the trial court what the proposal was for resolving this matter. The record is clear that the proposal was conditional and that further manifestations of assent were required from both Ward, through the submittal of revised plans, and from Brighton, through the approval of those plans.

2. There were never any plans approved, which was an essential condition of the proposed settlement.

There could not be any settlement until Brighton approved Ward's plans. The October 28, 1998 letter, which the trial court held to be a part of the settlement, specifically provided that "any settlement must be fully and completely documented and incorporated in an order of the Court that includes all approved plans . . . ." October 28, 1998 letter at 2 (Trial Exhibit No. 2) (emphasis added). On March 2, 1999, Brighton confirmed that an essential term of the proposed settlement was that "final plans, if approved, be included and incorporated into the Court's final order." See March 2, 1999 letter from James S. Jardine to Douglas J. Parry (R. 1258). Likewise, on March 3, 1999, James S. Jardine told the trial court that "if all of this is achieved and accomplished and finally resolved . . . that a final order would be entered with the Court, setting forth all of the terms of the settlement [and] attaching the plans . . . ." March 3, 1999 Transcript at 13 (R. 1745:13).

The parties contemplated that there would not be a settlement unless and until Brighton approved Ward's plans. It was undisputed that Brighton never approved Ward's plans, and therefore, there was no settlement between the parties.

3. The proposed agreement was ambiguous and lacked sufficient definiteness to be enforced and the parties failed to reach a meeting of the minds on essential terms of the agreement

It is well-accepted that "a contract will not be specifically enforced unless the obligations of the parties are 'set forth with sufficient definiteness that it can be performed." Plateau Mining Co. v. The Utah Division of State Lands and Forestry, 802 P.2d 720, 726 (Utah 1990). See also Oberhansly v. Earle, 572 P.2d 1384, 1386 (Utah 1977) ("It is a basic principle of contract law there can be no contract without a meeting of the minds of the parties which must be spelled out either expressly or impliedly with sufficient definiteness to allow enforcement."); Sackler, 897 P.2d at 1220 ("Under the principles of basic contract law, a contract is not formed unless there is a meeting of the minds.").

In determining whether a contract has been reached between two parties, the court may examine a number of factors, including "the extent to which express agreement has been reached on all the terms to be included," and "whether it has few or many details." Sackler, 897 P.2d at 1221. This case involves "many details" which were never reduced to a writing and upon which Brighton and Ward did not reach a meeting of the minds.

In this case, the trial court held that the terms of the settlement agreement were contained in the seven page October 28, 1998 letter, the three page February 22, 1999

letter, and the twenty-five page March 3, 1999 transcript. The two letters could contain as many as fifty to seventy separate requirements depending on how the letters are interpreted. The letters contain language such as Brighton "suggests" Ward do certain things or Ward "should" do certain things, making it unclear whether these suggestions are terms of a settlement. In fact, on March 2, 1999, Brighton informed Ward that "the February 22, 1999 letter does not set out terms of settlement but does list three areas of deficiency." March 2, 1999 letter from James S. Jardine to Douglas J. Parry (R. 1400).

The letters include extremely broad and ambiguous language such as requests for more "detailed drawings" and statements that the plans are "incomplete" or do not "adequately clarify" certain items. Judge Young himself recognized that the agreement was not very specific, stating that "I was uncomfortable with the specificity of it." Trial Transcript, Vol. II (R. 240) (Nevertheless, he concluded that it was "sufficiently specific that there could be a common understanding."). Id.

The fact that the parties have disagreed on the exact terms of the settlement is evidence that the agreement was too vague and ambiguous to be enforced. Did the "settlement" require Ward to simply comply with FCOZ (by using a tiered retaining wall system for example), or was he required to use a stepped patio? Did the "settlement" simply require Ward to provide "more" detail on the front porch, or was he actually prohibited from using a "heavy black line" to show grading? Did the settlement require Ward to produce a detailed survey of the entire Property, or just the areas of disturbance? Did the "settlement" require the cabin to be "on grade on the west," or sited at a main

level of 116.83 feet or both? (Carl Eriksson indicated that siting the cabin at 116.83 would place the cabin below grade). Did the "settlement" require Ward to pay Brighton's attorney's fees. Was allowing Ward to build in the 1999 season a condition of the settlement? These are just a few examples of the areas of disagreement between the parties that resulted from the vague and ambiguous nature of the letters which were determined by the trial court to constitute a binding contract.

The failure of the parties to reach a meeting of minds is perhaps best illustrated by the issue of the payment of attorney's fees. As set forth in the Statement of Facts, Brighton maintains that after the proposed settlement, Ward was still required to pay Brighton's costs of review of plans. See, e.g., Trial Transcript, Vol. II (R. 1751:285). Ward, on the other hand, believed that to the extent Brighton had the right to require him to pay its fees as a condition of review, it compromised that right in the settlement that the trial court ruled to exist. Trial Transcript, Vol. II (R. 1751:477-78). The parties have a fundamental disagreement on this and other essential terms of the agreement

As a further example, Ward maintains that an essential part of any agreement was that Brighton would approve his plans in time to allow Ward to build in 1999 building season. After Brighton delayed approval of the plans, building in the 1999 season became impossible, thus frustrating any purpose of the settlement and further establishing a failure of conditions precedent. See Affidavit of Gregory M. Ward (R. 1365).

The parties contemplated that if plans were approved, those plans would be attached to an order of the court "setting forth all the terms of the settlement." Transcript

of March 3, 1999 hearing (R. 1745:13). This was never done. The terms of the settlement were never agreed upon and the agreement ruled to exist by the trial court lacks sufficient definiteness to be an enforceable agreement. As Mr. Jardine stated on the record, this matter would be resolved "if this goes through." (R. 1745:15). It didn't "go through." There were no approved plans, no definite terms agreed upon, no meeting of the minds, and no settlement.

POINT II

THE TRIAL COURT ERRED IN GRANTING BRIGHTON'S MOTION TO PAVE THE PRIVATE ROADWAY ACROSS WARD'S PROPERTY WITHOUT GRANTING WARD NOTICE AND AN OPPORTUNITY TO BE HEARD

Brighton's request to pave the private roadway across Ward's property was based on its argument that the parties had a binding settlement agreement in which Ward agreed that the road could be paved. As set forth above, the settlement was a proposal and there would not be any settlement until Brighton approved Ward's plans. Perhaps nowhere is this clearer than on the point regarding the pavement of the roadway, where Brighton's counsel stated on March 3, 1999, that "one of the issues is whether the road would be paved. It's our understanding that <u>if this goes through</u>, we would pave the road, at Brighton Corporation's expense. " March 3, 1999 Transcript (R. 1745:15) (emphasis added). On August 5, 1999, Brighton's counsel wrote to Ward's counsel as follows regarding pavement of the roadway:

> We also recognize that the Property Use Agreement refers to the roadway easement as a "gravel" roadway. Accordingly, we agree that until the issue

> is resolved, as a practical matter, Brighton can pave the road this year only with your client's agreement.

August 5, 1999 letter from Scott A. Hagen to Douglas J. Parry (attached as Exhibit B to Ward's Objection to Order Allowing Plaintiff to Pave Private Roadway) (R. 1360).

Thus, in August 1999, Brighton itself understood that it could not pave the roadway without Ward's permission, belying its later argument that there was a binding settlement as of March 1999, that gave it the right to pave the roadway.

The trial court granted Brighton's motion to pave the road without giving Ward any notice or opportunity to be heard, and in direct contravention of the Property Use Agreement, thus depriving the defendant of an important property right.[12] The United States and Utah Constitutions provide that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. See also Utah Const. Art. I, § 7 ("No person shall be deprived of life, liberty or property, without due process of law.").

The Utah Supreme Court has made clear that due process requires, among other things, inquiry into the merits of the question presented; notice of the purpose of the inquiry; opportunity to appear in person or by counsel; and fair opportunity to be heard.

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[12]The trial court's order allowing pavement of the road is even more astonishing in light of the fact that the court had previously found that the purpose of the restrictive covenants was to preserve the "rustic nature of the surrounding lands, including the Subject Property" and to "limit the intrusion of high traffic." October 4, 1994 Order at ¶ 8 (R. 312).

In re: L.G.W., 638 P.2d 527, 528 (Utah 1981). See also Simon v. Craft, 21 S.Ct. 836, 839 (1901) ("[t]he essential elements of due process of law are notice and opportunity to defend."). This Court has further explained that procedural due process requires "notice and opportunity to be heard, which must be observed in order to have a valid proceeding affecting life, liberty, or property." Wells v. Children's Aid Society of Utah, 681 P.2d 199, 204 (Utah 1984). In addition, "where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process." Nelson v. Jacobsen, 669 P.2d 1207, 1212 (Utah 1983) (emphasis added).

The Judicial Council and the Supreme Court adopted rules in the Code of Judicial Administration designed to ensure that parties are given due process of law. One such rule is found in Rule 4-501, which provides that a party has ten days to oppose a motion. Rule 4-501(1)(B), Rules of Judicial Administration. In this case, Ward had absolutely no notice and no opportunity to be heard with regard to the plaintiff's motion to pave the roadway. Not only was the trial court's granting of the motion error as explained above in Point I (based on the lack of a binding settlement agreement), such action by the trial court was a clear violation of Ward's due process rights. The trial court's order should be reversed and Brighton ordered to remove the pavement from Ward's Property and restore Ward's Property to its original condition.

POINT III

THE TRIAL COURT ERRED IN RULING ON SUMMARY JUDGMENT IN FAVOR OF BRIGHTON REGARDING PAYMENT OF ATTORNEY'S FEES, HAVING A LICENSED ARCHITECT SIGN PLANS, AND APPLYING FCOZ TO THE PLANS

The trial court erred in granting plaintiff's motion for partial summary judgment for two reasons: (1) there were disputed facts regarding the factual basis for the motion; and (2) there is no legal basis for the court to award attorney's fees to Brighton, require the plans to be signed by a licensed architect, or allow Brighton to apply FCOZ in examining the plans.

A court deciding a case on summary judgment does not resolve factual issues. Schurtz v. BMW of North America, Inc., 814 P.2d 1108, 1111 (Utah 1991). "The party moving for summary judgment must establish a right to judgment based on the applicable law as applied to an undisputed material issue of fact." Lamb v. B & B Amusements Corp., 869 P.2d 926, 928 (Utah 1993). The trial court must assess those facts and all reasonable inferences fairly drawn from those facts "in a light most favorable to the party opposing summary judgment." Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982).

The trial court failed to apply these principles when it considered and granted Brighton's partial summary judgment motion. Brighton's argument in favor of its summary judgment motion was based on Brighton's factual assertion that Ward had repeatedly submitted "ambiguous" plans that made it difficult for Brighton to determine whether the plans were adequate and created expense for Brighton. See Affidavit of Mary M. Barton at ¶ 3 (R. 871-73). Brighton therefore sought to have the court impose

upon Ward the cost of any review of further plans and require a licensed architect to sign any plans as a condition of plaintiff's reviewing the plans (an additional unnecessary expense to Ward).

However, Brighton's assertion that the plans submitted by Ward were ambiguous was controverted by the affidavit of a licensed architect, who found the plans "clear and unambiguous." Affidavit of Kimble Shaw at ¶¶ 5-6, 10 (attached as Exhibit J to Memorandum in Opposition to Motion for Summary Judgment) (R. 956). Shaw further testified that Ward's plans "qualify for any reasonable plan approval process including the approval process of Salt Lake County required for obtaining a building permit." Id. at ¶ 7. Additionally, a certified plan reviewer reviewed Ward's plans and determined that the plans were "clear and can be easily understood [as] to 'the proposed placement, plans and design'". (Letter from John J. Saunders, July 13, 1995 Hearing Exhibit 15, p.6). The sole factual basis for Brighton's summary judgment--that Ward's plans were ambiguous--was clearly a disputed issue of fact that precluded summary judgment.

Further, there is no legal basis for the relief requested in the summary judgment motion. The rights and obligations of the parties were clearly spelled out in the Special Warranty Deed. As stated by this Court, "[a] court will not . . . make a better contract for the parties than they have made for themselves." Rio Algom Corp. v. Jimco, Ltd., 618 P.2d 497, 505 (Utah 1980).

None of the requirements Brighton sought to impose on Ward--payment of fees, use of a licensed architect, or being subjected to FCOZ--are contained in the Special

Warranty Deed. With regard to FCOZ, Salt Lake County had determined that Ward's Property was exempt from the ordinance. See August 11, 1998 Certified Letter of Public Record (R. 924)

In addition, "Utah follows the 'American rule' with regard to awards of attorney fees. This general rule requires each party to bear his or her own attorney's fees in the absence of a statute or enforceable contractual provision to the contrary." Cobabe v. Crawford, 780 P.2d 834, 835 (Utah Ct. App. 1989). There was no legal basis for the court to allow Brighton an award of fees to review plans submitted to it by Ward.

POINT IV

THE TRIAL COURT ERRED IN REFUSING AT TRIAL TO CONSIDER THE LATEST SET OF PLANS SUBMITTED TO BRIGHTON BY WARD

On October 22, 1999, the trial court ordered that the parties had entered into an enforceable settlement agreement and that the issue to be decided at trial was "whether the plans submitted by Ward after the hearing on March 3, 1999 complied with the criteria stated in the March 3, 1999 stipulation and incorporated letters." November 3, 1999 Order at ¶ 3 (R. 1417-18). Ward submitted plans in April 1999, supplemented those plans in June 1999, and made further revisions requested by Brighton in August 1999, which were submitted to Brighton for review on October 6, 1999.

Ward submitted the October 1999 Plans "hoping to get a final review and approval from Brighton . . . in hope to settle and finally resolve this matter." (R. 1751:474). Ward's counsel pleaded with Brighton to review the October plans, which contained

revisions that had been requested by Brighton. See, e.g., November 1, 1999 letter from James K. Tracy to James S. Jardine (Trial Exhibit No. 39). Brighton refused to review the plans and insisted that the trial be on the earlier plans, even though the October Plans addressed many of the concerns raised by Brighton regarding the June 1999 Supplements.

According to the plain terms of the trial court's order setting forth the issue to be tried (which order was drafted by Brighton), the trial should have been on whether the October Plans submitted by Ward (the latest plans) complied with the settlement that the trial court had ruled on October 22, 1999, existed between the parties.

The trial court ruled that the October Plans "were not properly presented for review." February 3, 2000 Order at ¶ 2 (R. 1691). The trial court felt that the October Plans were untimely. At the end of trial, the trial court stated that "all those plans did for this trial [i.e., the October 1999 Plans] [was to] create some emotional appeal, that you we're still trying; but it's too late." Trial Transcript, Vol. III (R. 1752:577).

Any claim by Brighton and the ruling by the trial court that the October 1999 Plans were untimely is without merit. There were no deadlines for submitting plans in the court's November 3, 1999, Order. The trial court did not even establish the issue to be decided at trial until October 22, 1999, over two weeks after Ward had submitted the October 1999 Plans to Brighton for review. It was clear that the real reason Brighton refused to review the plans was not the "timeliness" of the plans, but rather, because Brighton was insisting on payment of its attorney's fees from prior reviews as a condition of review. As explained above, even if the trial court had been correct in holding that the

parties had entered into a settlement, payment of attorney's fees was not a term of the settlement and it was improper for Brighton to refuse to review the plans on this basis.[13]

The trial court's refusal to consider the October 1999 Plans was contrary to the court's order that the trial would be on the plans submitted by Ward after March 3, 1999.

POINT V

THE TRIAL COURT ERRED IN RULING AT THE TRIAL OF THIS MATTER THAT BRIGHTON PROPERLY REJECTED WARD'S PLANS

A trial court has a duty to make findings of fact. "The ultimate test of the adequacy of a trial judge's findings is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision." Kunzler v. O'Dell, 855 P.2d 270, 275 (Utah Ct. App. 1993). "The court's findings may be written separately or 'gleaned from the transcript, the opinion or the memorandum decision.'" Id. In this case, the trial court failed to make specific findings of fact. Judge Young stated at the conclusion of trial as follows:

> So, I told you this was a thumbs-up thumbs-down kind of trial and I find thumbs down, that the defendant did not comply, so that's the basic finding that I'm making here. I'm not going to make findings about that."

Trial Transcript, Vol. III (R. 1752:598, lines 7-11.

"Unless the record 'clearly and uncontrovertedly support[s]' the trial court's decision, the absence of adequate findings of fact ordinarily requires remand for more

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[13]In fact, Brighton's counsel stated on March 3, 1999, that the proposed settlement would resolve "all other claims" between the parties. March 3, 1999 Transcript (R. 1745:10). Issues regarding attorney's fees are "claims" that would have been resolved.

detailed findings by the trial court." Woodward v. Fazzio, 823 P.2d 474, 478 (Utah Ct. App. 1991). However, it would serve no purpose to remand this case for additional findings on the April and June 1999 Plans. Because the trial court erred in not considering the latest set of plans, any new trial would have to examine a different set of plans in any event. Further, there are findings that can be "gleaned" from the record upon which this Court can determine that the plans should have been approved.

1. The "finality" of Ward's plans. It is clear that the trial court believed that Ward had submitted plans that were not "final." It appears that the trial court felt it could rule that the plans were properly rejected on this basis alone. See, e.g. Trial Transcript, Vol. III (R. 1752:594) ("Your clients are in the position now where they have acknowledged not having filed final plans, and I have no choice in this case but ruling as I will. I cannot find that there has been compliance by the defendant with the requirements of the settlement agreement.").[14]

The fundamental problem with Brighton's argument and Judge Young's "finding" regarding final plans is that the word "final" was never defined. Kimble Shaw and Gregory Ward made it clear that no plans would be "final" until Brighton approved the plans. See, e.g., Testimony of Greg Ward (R. 1751:501) ("If Brighton Corporation would

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[14]In closing argument, Brighton argued that it was significant that Ward testified that although he hoped Brighton would approve his plans, he did not believe that they would. Testimony of Greg Ward (R. 1751:521). This does not mean that the plans did not comply with all reasonable requirements that could be imposed by Brighton or that Brighton should not have approved the plans. It simply reflects the fact that Ward had lost all confidence that Brighton would ever act in good faith and approve the plans.

have approved those plans, then they'd be final plans; but since Brighton Corporation didn't approve those plans underneath the settlement, we wanted to continue to work towards those and that's why we continued on to October, 1999 plans."); Testimony of Kimble Shaw (R. 344) ("I would keep adding and deleting information as required, as requested until we had a clear set of drawings that we could all agree on."). The plans were never approved by Brighton and therefore, the plans were not "final." They were "final" in the sense that Ward believed that he had complied with all the requirements needed to obtain approval. Brighton even stipulated at trial that Ward believed he had complied with all the requirements necessary for plan approval. See Trial Transcript, Vol.. II (R.1751:482).

2. **Detailed drawings of the north porch.** Brighton's argument was that a "heavy black line" was used by Shaw to illustrate the grading for the north porch and that in the October 28, 1999 letter, Brighton stated that the "heavy black line" was not sufficient. First, this point illustrates the failure of the parties to reach a meeting of the minds on the "settlement" and why the "proposed settlement agreement" was too vague and ambiguous to constitute a binding contract. Ward does not believe that a term of the contract between the parties was that his architect could not use a heavy black line to illustrate finished grade. Ward understood that Brighton wanted additional drawings of the north porch, which were provided to Brighton by Shaw. See Trial Exhibits Nos. 17, 18, 20, 10, 11, and 7.

On this point, the trial court commented that "[i]f Mr. Shaw tells Mr. Richardson, that black line means an elevation at such a level, then Mr. Richardson is either going to have to say, I agree with that or I don't." Trial Transcript, Vol. II (R. 1751:540). Neil Richardson, Brighton's expert, never testified that the "heavy black line was insufficient." Consequently, trial court would should have found in Ward's favor on this point.

3. "New" and "proposed" easements. The proposed settlement required Ward to acknowledge Brighton's waterline easement, which was conceded by Brighton to have been lowered into the ground and extended from its original position. See, e.g. Testimony of Mary Barton (R.1750:142-43). Consequently, there is no dispute that the waterline is different than it was originally--i.e., it was "extended" by Brighton. Ward showed the "extension" on the survey and labeled it a "new" and "proposed" easement. Brighton's sole objection was that Ward used the words "new" and "proposed" to describe the easements. This description was accurate.

The trial court rejected Brighton's objection on this point, stating that he wasn't concerned about semantics and that "there's no fundamental objection to this because its still the same exact location?" Trial Transcript, Vol. I (R. 1750:86, 143, 148).

4. Placement of the sewer line. Ward originally placed the sewer line across the middle of the property because that is where the sewer district contemplated the line would run and because it would avoid unnecessary destruction of trees. Ward put the sewer line on the west side of the property on the October 1999 Plans which Brighton refused to review. The trial court stated that "if the only problem here was the sewer line

there wouldn't be any problem." Trial Transcript Vol. II (R. 1751:257, lines 17-18). In addition, the trial court stated at the conclusion of trial that, with regard to the location of the sewer line, "[i]f there were circumstances, for instance, that require cutting down of trees and other things to go west and along that route and you can go right up a driveway on the other and there isn't a gravity problem or anything else, then they [Brighton] ought to be reasonable about that." Trial Transcript, Vol. III (R:1752:597). It is fair to "glean" from the record that the trial court rejected this point as an adequate basis for Brighton to reject Ward's plans.

5. South side patio. Ward proposed terracing the south patio to comply with FCOZ. Neil Richardson testified that he believed that the tiered retaining wall would not comply with FCOZ. Kimble Shaw and Greg Ward disagreed. The trial court refused to allow Ward's expert, Carl Eriksson, to testify on this issue. However, the evidence presented at trial was that the retaining wall was less than six feet at the corner of the planter box in question which was used to terrace the wall. See Testimony of Greg Ward (R. 1751:514-15). There were no findings of fact made on this issue by the trial court.

6. Updated survey. First, it is important to note that the October 28, 1998 letter does not require an updated survey of the entire property. Second, the March 3, 1999 hearing transcript indicates that an updated survey was only required to address in detail "areas of disturbance." See Trial Exhibit No. 1 (March 3, 1999 Transcript) at 5, lines 2-4; Trial Exhibit No. 2 (October 28, 1999 letter) (requesting a copy of the original survey). The survey submitted by Ward showed adequate detail in the "areas of disturbance." Third,

Ward's evidence was that an updated survey was provided to Brighton as soon as the snow in the canyon receded enough to allow a surveyor access to the property. Testimony of Greg Ward (R.1751:467); Trial Exhibit No. 46.

Relating to this point, the trial court remarked that although Neil Richardson testified that he thought the survey that accompanied the June 1999 Supplements wasn't accurate, Richardson did not address the fact that the survey was done by a bona fide surveyor and that it was Brighton's burden to show "by some preponderance of the evidence that his survey's inadequate." Trial Transcript, Vol. II (R. 1751:541, lines 1-10). This can fairly be read to indicate that the trial court found that the objection to the survey was not a sufficient basis for Brighton to reject Ward's plans.

7. Color board and transparency of survey. Ward testified that he had already given Brighton the color board and the transparency of the survey. Testimony of Greg Ward. Trial Transcript, Vol. II (R. 1751:447-48, 486-87). According to Brighton, the "color board" was "not a big deal." Testimony of Mary Barton, Trial Transcript, Vol. I (R. 1750:132). When Brighton made comments to Ward about his plans, Brighton never raised the color board or the transparency as an area of noncompliance. Testimony of Greg Ward, Trial Transcript, Vol. II (R. 1751:488, 534). The trial court did not make any specific findings on these two issues, but did indicate that it felt it would have been better for Ward to submit another copy of the color board and the transparency, even if Brighton already had in its possession identical copies of those items. Trial Transcript, Vol. II (R. 1752:539).

Ward substantially complied with the "settlement" by having previously delivered a copy of the color board and transparency to Brighton and Ward reasonably relied on Brighton's failure to raise this as an area of deficiency in its earlier responses to the April 1999 Plans or the June 1999 Supplements. See, e.g., Cache County v. Beus, 1999 UT App 134, ¶¶ 36-37, 978 P.2d 1043, 1050 (Utah Ct. App. 1999) (under doctrine of substantial compliance, court should determine the materiality of a breach and decide whether the party has substantially complied).

8. Corrected version of "support documents." Mary Barton admitted at trial that the prior plans submitted by Ward (which included the so-called "support documents") were not to be withdrawn until Brighton approved Ward's latest plans. Testimony of Mary Barton (R. 1751:117). Ward testified that he intended to withdraw those "support documents" at the appropriate time and did not intend to resubmit those documents to Salt Lake County. Testimony of Greg Ward (R. 1751:533-34).

The purpose of this requirement was Brighton's concern that inaccurate documents would be on file with Salt Lake County. The requirement presupposes that Ward intended to refile the support documents. If the documents were not resubmitted to the county, there would be no need to correct them and submit them to Brighton. The trial court did not make any reference to this point.

POINT VI

THE TRIAL COURT ERRED IN REFUSING TO ALLOW WARD'S EXPERT AND FACT WITNESS, CARL ERIKSSON, TO TESTIFY AT TRIAL

Rule 702 of the Utah Rules of Evidence provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Utah R. Evid. 702 (emphasis added).

The Utah Court of Appeals has explained that "[e]xpert testimony is required '[w]here the average person has little understanding of the duties owed by particular trades or professions' as in cases involving medical doctors, architects, and engineers." Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 263 (Utah Ct. App. 1997) (quoting Wycalis v. Guardian Title, 780 P.2d 821, 826 n.8 (Utah Ct. App. 1989)). See also Ortiz v. Geneva Rock Products, Inc., 939 P.2d 1213, 1217 n.2 (Utah Ct. App. 1997) ("Expert testimony is useful in professions that require a high degree of specialized knowledge such as engineering); Wessel v. Erickson Landscaping Company, 711 P.2d 250, 254 (Utah 1985) (trial court erred in refusing to consider the testimony of an engineer relating to compliance with building code requirements in a case dealing with the negligent design of retaining walls).

In this case, Brighton argued that it properly rejected Ward's plans because, among other things, (1) the plans were not "final" plans; (2) the plans did not comply with the zoning ordinance ("FCOZ"); and (3) Ward's drawings did not have enough detail. Ward

attempted to call an engineer, Carl Eriksson, who had over 26 years of experience in reviewing plans for compliance with building and zoning codes, to testify, among other things, that Ward had submitted a complete set of plans; that the plans complied with FCOZ; and that Ward's plans were sufficiently detailed and as clear as any plans he had ever seen.

The trial court had allowed Brighton's architect to testify on these issues. However, the trial court refused to allow Carl Eriksson to testify on these same issues because (1) Eriksson had not read the settlement agreement and (2) the court felt that whether Salt Lake County would approve Ward's plans was irrelevant. Trial Transcript, Vol. II (R. 1751:233). Mr. Eriksson did not need to read the settlement agreement to testify as an expert in this case. Mr. Eriksson reviewed the plans and the objections to those plans and was prepared and qualified to testify on the legitimacy of the objections.

The trial court's second reason for disallowing Mr. Eriksson's testimony presumably is directed to Mr. Eriksson's testimony as a fact witness. Rule 601 of the Utah Rules of Evidence provides that every person with personal knowledge is presumed to be competent to be a fact witness. Utah R. Evid. 601; Utah R. Evid. 602. Mr. Eriksson had personal knowledge that the design in question had already been approved by Salt Lake County as complying with FCOZ.

POINT VII

THE TRIAL COURT ERRED IN DENYING WARD'S 1995 APPLICATION FOR A DETERMINATION THAT CONSENT TO BUILD THE CABIN HAD BEEN UNREASONABLY WITHHELD

The trial court erred when it denied Ward's application for a determination that consent had been unreasonably withheld in 1995, because Brighton's grounds for rejecting Ward's plans were neither expressed in the restrictive covenants nor reasonable. After the October 4, 1994 order was issued, enjoining Ward from beginning construction, Ward submitted revised plans to Brighton that eliminated the basement and the loft and reduced the square footage of each floor below 1,200 square feet.

The only evidence presented by Brighton in support of the reasonableness of its rejection of Ward's plans was the testimony of Neil Richardson, who stated that: (1) the attic could conceivably be converted at some later date to a loft; (2) the pitch of the proposed cabin's roof was 8/12 (Richardson asserted that the "preferred" Alpine design in Utah was a 3/12 pitch), and the plans were ambiguous regarding the total roof height; (3) the elevations shown on the plans were different than some topographical map previously provided to Richardson; and (4) in Richardson' opinion, the proposed plans did not meet the Wasatch Canyons Development Standards.

Each of these grounds for rejection was either unreasonable or against the clear weight of the evidence. Ward's plans completely eliminated the loft and was designed so that it was incapable of holding live loads. Transcript of July 13, 1995 Hearing (R.1753:21). There is nothing in the Special Warranty Deed prescribing the pitch of the

roof. Richardson conceded that the Wasatch Master Plan's study found an 8/12 pitch acceptable. (R.1753, at 54-55).[15] There was no evidence presented at the hearing that the topography on the proposed plans was wrong. Salt Lake County officials stated that the plans complied with the Wasatch Canyon Development Standards, were clear in their presentation, and could easily be understood for an approval process regarding "the proposed placement, plans, and design" of the cabin. July 13, 1995 Hearing Exh. No. 15.

In light of Brighton's objections, which were either unsupported by the evidence or unreasonable, the trial court should have granted Ward's application for a determination that approval had been unreasonably withheld.

POINT VIII

THE TRIAL COURT ERRED IN NOT RECUSING JUDGE DAVID S. YOUNG AND THE SUPREME COURT SHOULD REMOVE JUDGE DAVID S. YOUNG FROM THIS ACTION FOR BIAS AND FOR DENYING WARD HIS DUE PROCESS RIGHTS THROUGHOUT THE PROCEEDINGS BELOW

Ward requests that Judge Young be removed from this case because his unfair rulings have demonstrated actual bias against Ward. Furthermore, the trial court's partiality has effectively denied Ward due process. It is axiomatic that parties in a judicial proceeding are entitled to have their matter heard and decided by a judicial officer who is free of any hint or suggestion of possible impartiality. This Court has made clear that, "a judge should recuse himself when his impartiality might reasonably be

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[15]Brighton's asserting the pitch of the roof as grounds for rejecting Ward's plans appears even more pretextual and disingenuous in light of the fact that plaintiff's cabin on the adjoining property has a 12/12 pitch. (R.1753:20; R.1744:270).

questioned." State v. Neeley, 748 P.2d 1091, 1094 (Utah 1988), cert. denied, 487 U.S. 1220 (1988)) (citing Utah Code of Judicial Conduct). The Utah Code of Judicial Conduct provides that "[a] judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned." Utah Code of Judicial Conduct, Canon 3E.1 These standards "may require recusal when no actual bias is shown." Neely, 748 P.2d at 1094.

In 1996, while this case was pending, James Jardine and numerous other attorneys at Ray, Quinney & Nebeker, who serve as lead counsel for Brighton, played a high profile and publicly advertised role in Judge Young's closely contested retention election. Ward asked Judge Young to recuse himself on this basis, but Judge Young refused. The matter was then referred to Judge Leslie Lewis in accordance with Rule 63(b) of the Utah Rules of Civil Procedure. When reviewing the issue, Judge Lewis applied the wrong standard, erroneously stating that Ward was required to show actual bias in order to obtain Judge Young's recusal. Court's Ruling by Judge Leslie A. Lewis (R. 718-19). The law is clear that the burden of showing actual bias should not have shifted to Ward until "[a]fter [Judge Young] had been approved to continue." State v. Alonzo, 973 P.2d 975, 979 (Utah 1998). Judge Lewis should have ordered Judge Young to be recused if his impartiality might reasonably have been questioned.

Failure to recuse constitutes reversible error if there is "a showing of actual bias or an abuse of discretion." Neeley, 748 P.2d at 1094. However, Ward maintains that the law requiring a showing of "actual" bias on appeal presupposes that the complaining

party is seeking to overturn a decision of the trial court based on bias. See, e.g., State v. Neeley, 748 P.2d 1091, 1094 (Utah 1988) (stating that failure of judge to recuse himself where impartiality might reasonably be questioned "does not necessarily mean that the defendant is entitled to a new trial."); Alonzo, 932 P.2d 606, 610 (same). Ward is not requesting that this Court reverse any of Judge Young's rulings on the basis that he was biased. The Court can overturn those rulings on the clear error encompassed in the rulings themselves. Ward is simply seeking to have Judge Young removed from future proceedings regarding this matter to ensure that Ward will obtain an impartial and fair resolution of this case. Consequently, the reasoning behind requiring a showing of actual bias is not present and the Court should not apply this higher standard for recusal.

In any event, Ward can show sufficient evidence of actual bias through the cumulative effect of repeated unfair rulings by Judge Young. Judge Young has repeatedly prejudged this case, as evidenced on at least two occasions where Judge Young announced his decisions on motions before he had reviewed them, and before Ward had an opportunity to respond. The most egregious of these was Judge Young's order allowing Brighton to pave a road across Ward's land without providing Ward notice and an opportunity to be heard.

By ruling that Ward must pay Brighton attorney's fees as a condition of review (on a summary judgment motion, no less, and in the face of clearly disputed facts), Judge Young rewrote the Special Warranty Deed and made it impossible for Ward to even get a review by Brighton, let alone approval.

Judge Young's unfair rulings continued through trial, where he announced that he would not consider the latest set of plans submitted to Brighton in October 1999, because Brighton had refused to review them. Then, Judge Young refused to allow Ward's witness, Carl Eriksson, to testify regarding whether Ward's plans were deficient as claimed by Brighton in their case in chief.

When reviewing Judge Young's refusal to recuse himself, Judge Lewis also questioned the delay in Ward's bringing the motion requesting recusal. While it is true that the affidavit asserting bias was to be filed "as soon as practicable after the case has been assigned or such bias or prejudice is known," Utah R. Civ. P. 63(b) (1997), this requirement had not been dispositively defined under Utah law at the time Ward filed his motion. In discussing the purpose of the timeliness rule, this Court explained in Madsen v. Prudential Federal Savings and Loan Ass'n, 767 P.2d 538, 543 (Utah 1988), that "[a] party who has a reasonable basis for moving to disqualify a judge may not delay in hope of first obtaining a favorable ruling and then complain only if the result is unfavorable." Id. at 542. Such a tactic is not at issue here. Ward filed his affidavit after learning about the potential for bias before any further rulings were issued by Judge Young. This Court has recognized that although a motion to disqualify must be made promptly, such a motion "should not be undertaken lightly." Madsen, 767 P.2d 542. It is one thing to delay making such a motion until after the judge makes an unfavorable ruling as in Madsen. It is quite another thing to consider such a motion carefully while nothing

substantive is happening in the case, and where no one will be prejudiced by such careful consideration.

Furthermore, Judge Young's bias became even more apparent after Ward filed his motion seeking recusal. Rule 63(b) provides that "[n]o party shall be entitled in any case to file more than one affidavit" requesting recusal. Utah R. Civ. P. 63(b). Thus, Ward was prohibited from filing another affidavit alleging bias and prejudice, despite the fact that Judge Young's bias became more pronounced.

Removing Judge Young from presiding over further proceedings in this matter is the only way to adequately protect Ward's due process rights. Under both the Utah Constitution and the United States Constitution, "[n]o person shall be deprived of life, liberty or property, without due process of law." Utah Const. Art. I, § 7; U.S. Const. am. XIV. One of the most fundamental principles of due process is that "all parties to a case are entitled to an unbiased, impartial judge." Anderson v. Industrial Commission, 696 P.2d 1219, 1221 (Utah 1985). As this Court has previously explained, "[a] biased decision maker is not only constitutionally prohibited, 'but our system of law has always endeavored to prevent even the probability of unfairness.'" Vali Convalescent & Care Institution v. Industrial Commission, 649 P.2d 33, 37 (Utah 1982) (quoting In re Murchison, 75 S.Ct. 623, 625, 349 U.S.133, 136 (1955)).

Due process demands a new trial "when the appearance of unfairness is so plain that [the Court is] left with the abiding impression that a reasonable person would find the hearing unfair." Bunnell v. Industrial Commission, 740 P.2d 1331, 1333 n.1 (Utah 1987).

Judge Young's consistently biased rulings can leave this Court and any reasonable person with no impression other than an impression of unfairness. Ward has been denied the use of his property for six years because Judge Young has refused to compel Brighton to exercise its responsibility to grant timely approval of Ward's plans. In fact, by granting Brighton's ex parte motion to pave the roadway running across Ward's land, Judge Young has allowed Brighton more use of Ward's land than he has allowed Ward himself.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant Ward the following relief:

1. The Court should rule that the trial court erred in holding that the parties had entered into a binding and enforceable contract and settlement agreement.

2. The Court should rule that the trial court erred in ruling on summary judgment (1) that Ward must compensate Brighton for all further costs, including attorney's fees, associated with any future review by Brighton of any new plans submitted by Ward as a condition of reviewing those plans; (2) that it was reasonable for Brighton to require a licensed architect to sign Ward's plans; and (3) that it was reasonable for Brighton to apply the Foothills and Canyons Overlay Zone ordinance of Salt Lake County in reviewing plans submitted by Ward.

3. The Court should rule that the trial court erred in ruling that Brighton could pave the roadway over Ward's Property, and that the trial court violated Ward's due process rights in granting this motion without providing Ward with adequate notice and a

fair opportunity to be heard. In addition, the Court should order that Brighton remove the pavement and restore Ward's Property to its original condition.

4. The Court should rule that the trial court erred in refusing to consider the latest set of plans submitted to Brighton by Ward and should direct the trial court that any future hearings must be held on the latest set of plans submitted by Ward.

5. The Court should rule that the trial court erred in holding that Brighton properly rejected the plans submitted by Brighton to Ward in 1999, and that Ward is allowed to build either the April 1999 Plans or the October 1999 Plans if he so desires.

6. The Court should rule that the trial court erred in refusing to allow Carl Eriksson to testify as an expert and as a fact witness at the trial of this matter.

7. The Court should rule that the trial court erred in refusing to rule that Brighton had unreasonably withheld approval of the plans submitted by Ward at the July 13, 1995 hearing, and should further rule that Ward may build those plans if he so desires.

8. The Court should rule that the trial court erred in not recusing Judge Young from this case and that Judge Young should be removed from this case and the case reassigned due to Judge Young's bias and denying Ward his due process rights throughout the proceedings below.

RESPECTFULLY SUBMITTED this 5th day of July, 2000.

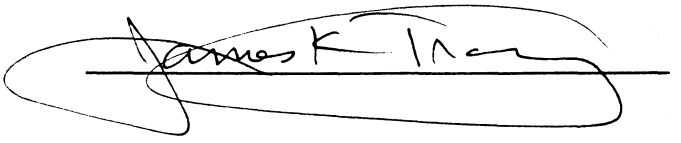
LeBOEUF, LAMB, GREENE & MacRAE, L.L.P.

By: _____
James K. Tracy
Attorneys for Appellant Gregory M. Ward

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 2000, I caused two true and correct copies of the foregoing BRIEF OF APPELLANT GREGORY M. WARD to be served by hand-delivery on the following:

James S. Jardine
Scott A. Hagen
RAY, QUINNEY & NEBEKER
79 South Main, #500
P.O. Box 45385
Salt Lake City, Utah 84145-0385



Contents of Addendum

Exhibit A

Mail tax notice to Isabel M. Coats Address P.O. Box 1110
Merced, Ca. 95341

5380249

SPECIAL WARRANTY DEED

BRIGHTON CORPORATION, a Utah corporation, organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, of County of Salt Lake, State of Utah. GRANTOR, hereby CONVEYS AND WARRANTS against all claiming by, through or under it to ISABEL M. COATS and WALTER M. COATS, as Joint Trustees of the Isabel M. Coats Trust dated December 10, 1985, GRANTEES, of Merced, California, for the sum of TEN DOLLARS ($10.00) and other good and valuable con siderations, the following described tract of land in Salt Lake County, State of Utah:

Beginning at the Northwest corner of Lot 29, Block 4, Silver Lake Summer Resort, according to the official plat thereof on file and of record in the Salt Lake County Recorder's office, and running thence South 87°33'0" East along the North line of said Lot 29, 115.5 feet (Record equals East); thence South 2°27'0" West 198.5 feet to the South boundary line of Grantor's property; thence North 87°33'0" West along the South boundry line of Grantor's property 115.5 feet (being the property conveyed to Grantor under Warranty Deed dated 1/28/61 as recorded 8/2/61 as entry number 1791991 in Book 1827 Page 346 in the office of the Salt Lake County Recorder); thence North 2°27'0" East 198.5 feet (Deed equals North) to the point of beginning. (Cont. .5263 acres more or less)

Basis of bearing: Line between the Salt Lake County Monument found at the intersection of Pine Street and Wasatch Street to Salt Lake County Mounument found in Prospect Street. Said line being South 28 Degrees 48 Minutes 47 Seconds East as surveyed. Bearings were rotated 2 Degrees 27 Minutes clockwise as needed to conform to street centerline data as shown on the Salt Lake County area reference plat for Section 35, Township 2 South, Range 3 East, Salt Lake Base and Meridian.

RESERVING unto the Grantor, its successors and assigns, a permanent easement and right-of-way for roadway and utility purposes over and across the hereinafter described premises to be used in common by the Grantor and Grantee herein, and other named Grantees of the Grantor for construction, reconstruction, maintenance, and repair of a roadway for ingress and egress and utility easements for waterlines, sewer lines, electrical lines, telephone lines, natural gas lines, and other utilities incidental to a residential use, to-wit:

Beginning at the Southwest corner of Lot 29, Block 4, Silver Lake Summer Resort according to the official plat thereof on file and of record in the Salt Lake County Recorder's Office, and running thence South 87°33'0" East 115.5 feet; thence South 2°87'0" West 20 feet; thence North 87°33'0" West 115.5 feet; thence North 2°27'0" 20 feet to the point of beginning.

The above-named Grantor, Grantee, and other named Grantees thereof shall use the easements and right-of-ways granted by this instrument in common with due regard to the rights of others and their use of such easements and right-of-ways, and such easements and right-of-ways shall not be used in any way that will impair the rights of others to use it. No party shall in any way obstruct the use of said easements and right-of-ways to the detriment of others holding a beneficial interest therein.

BK6560PG2780

DEFENDANT'S EXHIBIT

Grantor further reserves unto itself, its successors and assigns, permanent waterline easement as the same now exists under the above-described premises conveyed herein for the now existing residential waterline to the residence on Grantor's property together with the right of ingress and egress for the maintenance and repair of said existing water line.

BUILDING RESTRICTIONS. The above-described premises shall be limited to the construction of a single residential building containing not in excess of twelve hundred square feet on each floor, containing not more than two floors. Outside decking not under roof shall not be included in said twelve hundred square foot limitation.

Grantor expressly reserves the right to review and approve the proposed placement, plans, and designs for any improvements to be located upon the above-described property, which approval shall be timely and shall not be unreasonably withheld.

Subject to an existing right-of-way agreement dated September 12, 1990, between Brighton Corporation as Grantor and David S. Dransfield and Sarah Adelle Dransfield as Grantees, together with others in common as recorded September 18, 1990, in Book 6253 Page 2002, Entry Number 4967074 in the office of the Salt Lake County Recorder.

Subject to that certain waterline easement dated June 10, 1991, from Brighton Corporation, Grantor, to Silver Lake Company, Grantee of a prepetual waterline easement 10 feet in width extending along the Western property line of the premises conveyed herein.

Subject to any and all other existing right-of-ways and easements of record.

Subject to the restriction that upon the transfer or sale of the above-described premises the named Grantor and its successors and assigns who are descendants of Mary M. Barton are granted a first right of refusal for the purchase thereof, and Fred A. Moreton and Lucy W. Moreton and their descendants are granted a second right of refusal for the purchase thereof. A sale or transfer of the above-described premises to the descendants of Isabel M. Coats shall be exempt from said described first and second rights of refusal but said terms shall be binding upon the transfer of said premises to any party not a descendant of Isabel M. Coats.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the Board of Directors of the Grantor at a lawful meeting duly held and attended by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this 3 day of July, 1991.

BRIGHTON CORPORATION a Utah corporation,

BY Mary Moreton Barton
Mary Moreton Barton, President

STATE OF UTAH)
: ss.
County of Salt Lake)

On the 3rd day of July, 1991, before me, the undersigned, a Notary Public in and for said County and State, personally appeared MARY MORETON BARTON, known to be to be the President of BRIGHTON CORPORATION, the corporation that executed the within instrument, and known to me to be the person who executed the within instrument on behalf of the corporation herein named, and he duly acknowledged to me that said corporation executed the same in pursuance of a resolution of its Board of Directors.

NOTARY PUBLIC
Residing at: [redacted]

My Commission Expires:

BK6560PG2784

Exhibit B

PROPERTY USE AGREEMENT

This Agreement is made this 3 day of July, 1991, among BRIGHTON CORPORATION, a Utah corporation, and MARY M. BARTON, hereinafter collectively referred to as "BRIGHTON", and ISABEL M. COATS and WALTER M. COATS, as Joint Trustees of the ISABEL M. COATS TRUST dated December 10, 1985, and ISABEL M. COATS, Individually, hereinafter collectively referred to as "COATS", and FRED A. MORETON and LUCY W. MORETON, as Joint Tenants, hereinafter collectively referred to as "MORETON".

WHEREAS, BRIGHTON has sold to COATS a certain parcel of property 115.5 feet by 198.5 feet from the Westerly portion of the Brighton property, and BRIGHTON has sold to MORETON a parcel of property of the dimensions of approximately 112.5 feet by 274.25 feet constituting the most Easterly portion of the Brighton property,

NOW, THEREFORE, it is hereby AGREED among the parties as follows in regard to the use of said properties:

1. That as between BRIGHTON and COATS as adjacent property owners, each party agrees that what presently consist of the Easterly and Southerly portion of the existing circular driveway and the property in the immediate vicinity thereof will be restored to a natural state of wild flowers, aspen and pine, characteristic of the existing area. The restored area will be maintained by the respective property owners with no vehicular parking thereon. The existing pines, aspen and briar within the present circular driveway will not be removed by either party and will remain as a buffer zone between the two adjacent parcels.

2. For purposes of identification only in this agreement the COATS property shall be referred to as Parcel A, the BRIGHTON property as Parcel B and the MORETON property as Parcel C as to the South 140.5 feet thereof and Parcel 2 as to the North 122.5 feet thereof.

3. BRIGHTON and MORETON agree that MORETON will not make any application for a building permit nor will MORETON construct a residential building on Parcel C of their purchased property,

DEFENDANT'S EXHIBIT

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but that MORETON will place any residential building which it desires to construct on Parcel 2 of the purchased property.

4. BRIGHTON hereby grants unto COATS and descendants the first right of refusal to purchase the remaining BRIGHTON CORPORATION property and BRIGHTON hereby grants to MORETON and descendants the second right of refusal to purchase the remaining BRIGHTON CORPORATION property. If such purchas rights are not exercised by those parties owning the priorities to purchase, then the owner may sell the same to an outside purchaser on the same terms and conditions that the same were offered to those holding the first right of purchase and second right of purchase referred to in this paragraph.

5. COATS, BRIGHTON, and MORETON agree to participate in the expense of maintenance of the road right-of-way equally as to that portion which crosses the COATS property. BRIGHTON and MORETON agree to share equally in the maintenance and costs of the road right-of-ways as the same cross the BRIGHTON property to give ingress and egress to the MORETON property. David S. Dransfield and Sarah Adele Dransfield, who are the owners of a right-of-way for ingress and egress across the COATS, BRIGHTON and MORETON properties shall be obligated to contribute to the parties for their fair and proportionate share of road construction and maintenance on such right-of-ways. Each of the parties hereto shall receive compensation from the named Dransfields to the extent that the Dransfield right-of-way extends upon each of the properties of the named parties to this agreement.

6. The parties hereto agree that the designated 20 foot right-of-way as described on the deed from Brighton to Coats as used for roadway purposes shall consist of a single lane gravel roadway for vehicular travel, and that there shall be no parking of any vehicles on the roadway portion or on either side of the roadway portion within said 20 foot width right-of-way. Any and all utilities installed within the boundaries of said designated 20 foot right-of-way shall be constructed in compliance with then existing Salt Lake County ordinances.

NOTWITHSTANDING any other provisions hereof or any other provisions of the Deed of Conveyance from Brighton to Coats, it is expressly agreed among the parties hereto that Coats, at its sole expense, may at any time relocate said 20 foot right-of-way, referred to in the Coats Deed, any distance it may elect farther to the North of its present location, so long as any such new right-of-way connects to the now existing roadway on the Brighton property (B) at the common property line between the Coats property (A) and said Brighton property, and subject further to the condition that the curvature on any such new right-of-way as it transverses the Coats property shall be engineered in such manner that the Salt Lake County fire equipment serving said area can negotiate such roadway without difficulty. Coats, at its expense, will conduct a survey and obtain a metes and bounds survey description of such proposed new right-of-way as it shall traverse the Coats property (A) and connect with the existing road right-of-way at the common property line with the Brighton property (B).

As further consideration to Brighton and Moreton for the granting of the privilege to Coats to relocate said right-of-way, Coats covenants and agrees that Coats will not erect any type of building or structure upon that portion of the Coats property (A) within the boundaries of the old Forest Alley (as vacated) or upon Lot 29.

At such time as any such new right-of-way is agreed upon by the parties in accordance with the specifications set forth above-herein, it is agreed that the former 20 foot right-of-way as described in the Coats Deed shall be released. It is understood and agreed by the parties hereto that the right-of-way in favor of David S. Dransfield and Sarah Adele Dransfield for ingress and egress to their property will be adjusted to tranverse under or across such newly designated right-of-way, and that their prior right-of-way reserved over and across the Coats property (A) shall thereupon be released by them.

7. The 1991 property taxes upon the respective properties as purchased or retained by the named parties shall be pro-rated among them as of the date of their respective conveyances, relying upon the 1991 Salt Lake County Treasurer's Tax Billings. Commencing January 1, 1992, each party shall be responsible for its respective tax assessments.

8. BRIGHTON hereby grants to MORETON a 50 year lease upon the property specifically described as Parcel C lying adjacent and to the South of Parcel 2 for the sum of $1.00, receipt of which is hereby acknoweldged by BRIGHTON from MORETON, and BRIGHTON further covenants that upon request of MORETON it will convey said Parcel C by a Special Warranty Deed from BRIGHTON to MORETON for the consideration of ONE DOLLAR subject to the restriction that MORETON will not build a residential structure upon said Parcel C. BRIGHTON further grants unto MORETON the exclusive first right to renew said 50 year lease upon said Parcel C at any time before the expiration of the frist 50 years, for the consideration of ONE DOLLAR, and MORETON shall have the right to continue to enter into successive 50 year leases for said premises, in the event that MORETON has not requested a conveyance of the same from BRIGHTON.

9 . As between BRIGHTON and MORETON they reserve the right to change the route of the existing roadway as it crosses their respective premises upon determination by them from a survey that a different description would be more practical and serve them and the Drainsfields in a better way. The Westerly portion of the roadway and utility easement as it crosses over and under the COATS property may not be changed without the express written consent of the COATS property owner. In the event that all of the parties hereto and David S. Dransfield and Sarah Adele Dransfield should elect in writing to move the existing roadway and utility easement to a different location as it intersects the various property owners, then if such new easement is agreed upon by the parties and conveyed by respective deeds of easement as necessary, and if such utility easement does, in fact, make water

available to the existing BRIGHTON residence, then in such event, BRIGHTON agrees to release the COATS property from the certain permanent water line right-of-way which it now owns over and across the COATS property to serve the now existing BRIGHTON residence.

10. The within agreement shall be binding upon the parties hereto and all of their respective successors, assigns, and descendants, and the terms hereof supercede any and all prior oral agreements in any way entered into or among the parties in respect to the subject matters set forth herein.

IN WITNESS WHEREOF, this Agreement is executed the day and year previously set forth above herein.

BRIGHTON CORPORATION, a Utah corporation

BY: _____
Its President

_____
MARY M. BARTON, Individually
"Brighton"

WALTER M. COATS and ISABEL M. COATS, as Joint Trustees of the Isabel M. Coats Trust dated 12/10/85

_____
ISABEL M. COATS, Trustee

WITNESS: _____

_____
WALTER M. COATS, Trustee

WITNESS: _____

_____
ISABEL M. COATS, Individually
"COATS"

WITNESS: _____

_____
FRED A. MORETON

WITNESS: _____

_____
LUCY W. MORETON
"MORETON"

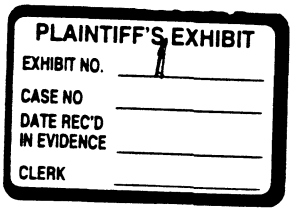
Exhibit C

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

BRIGHTON CORPORATION, Plaintiff,	:	
vs.	:	
ISABEL M. COATS and WALTER M. COATS, et al.	:	Case No. 940905453
Defendants.	:	

BE IT REMEMBERED that on the 3rd day of March, 1999, the above-entitled matter came on for Hearing before the HONORABLE DAVID S. YOUNG, sitting as Judge in the above-named Court for the purpose of this cause, and that the following audiotape proceedings were had.



APPEARANCES

For the Plaintiff:

JAMES S. JARDINE, ESQ.
SCOTT A. HAGEN, ESQ.
RAY, QUINNEY & NEBEKER
79 South Main Street, #500
Salt Lake City, Utah 84111

For the Defendant:

DOUGLAS J. PARRY, ESQ.
PARRY MURRAY & WARD
60 East South Temple #1270
Salt Lake City, Utah 84111

THE COURT: Good morning. The record may show we're convened in the matter of *Brighton Corporation, a Utah corporation, versus Isabel Coats and Walter Coats, et al.* The case is 940905453. This is the date set for trial. Counsel, will you first state your appearances, please.

MR. JARDINE: James Jardine and Scott Hagen for the Plaintiff, Brighton Corporation.

MR. PARRY: Douglas Parry for the Defendants.

THE COURT: I've been informed informally that there's a stipulated resolution of this case, is that correct?

MR. PARRY: If it can be stated correctly, yes.

THE COURT: Okay. Who will state it then correctly?

MR. JARDINE: Well, I have a lot of affection for Mr. Parry; I have no doubt that he'll criticize me in some fashion for the way I do this, Your Honor, but--

THE COURT: Okay.

MR. JARDINE: It, in fact, Your Honor, is a conditional settlement we'd like to read into the record. It's conditional because certain actions remain to be taken.

THE COURT: Okay.

MR. JARDINE: We propose to state the agreement on the record--

THE COURT: Uh-huh.

MR. JARDINE: --and then to formalize it later in an order for the Court to sign, if the remaining issues and

actions are satisfactorily resolved. And we would ask the Court to continue the trial date, and I think Mr. Parry will speak to that. We've agreed that we will review the contemplated plans to be submitted to us, within seven days of receiving them, and I think Mr. Parry will ask you about available trial dates within that time frame.

Let me see if I can state the agreement, and then we can deal with the trial date later.

THE COURT: Okay. All right.

MR. JARDINE: We sent a letter, dated October 28, 1998, to counsel for Mr. Ward, proposing a settlement and listing a number of issues. It's our understanding that Defendants have accepted the terms of that letter, with some additions and some corrections, which I will attempt to state.

As a sort of principal point, the letter contemplates, and the parties agree, that Mr. Ward will submit plans, signed by an architect, to--for review to Brighton Corporation. The parties have agreed that the plans will meet the requirements of listing of what should be included of two checklists provided last night by Neil Richardson to Kimball Shaw, with three exceptions. They would not need to include work of a landscape architect.

MR. PARRY: Correct.

MR. JARDINE: They would not need to include a slope analysis.

UNIDENTIFIED: Okay.

MR. JARDINE: And the updated and detailed survey need only address in detail what are called "areas of disturbance" by the architects.

MR. PARRY: Correct.

THE COURT: Okay.

MR. JARDINE: Another change is that the letter of October 28, 1998, addresses the proposed patio on the south and west of the proposed cabin. We modified our position on that patio in a letter dated February 22, 1999, and that supersedes the October 28, 1998, letter on that issue and, in general, says that they may have a patio of the outlying of the plans submitted to us, so long as it is step-down in compliance with "F" Cause, as to the cut.

There remains an issue outstanding that the future plans submitted to us will address, which is the location and design of the porch or front entrance proposed on the north side. Brighton Corporation has not received final plans that they regard as adequate for that proposal, including grading plans, and Brighton Corporation will review the plans submitted to determine whether the proposed plan, in that respect, adversely impacts its water line, and the architects talked last night about what the detail would be needed for that review to be done.

Otherwise, the letters talk--the list includes a number

of things, and I just--I think it's clear, but the plans will also include reference to where permanent parking would be and, also, how construction--there'd be a description of how construction would be staged.

As I said, the final plans, as described in the letters and as I've described today, will be submitted to Brighton Corporation, which will, with its architect, review the plans and respond within seven days of receiving them.

Brighton Corporation, we--the parties agree that Brighton Corporation cannot pre-approve the plans until it sees them, but if the issues raised in the letters of October 28, 1998, and February 22, 1999, and the noted ambiguities are addressed and resolved, Brighton Corporation is not presently aware of other grounds on which it would disapprove the plans.

There are other issues to address, in terms of the proposed settlement. A term of the proposed settlement is that Mr. Ward will withdraw all plans filed to date with the county and only file, in the future, plans approved by Brighton Corporation and the Court. Mr. Ward has expressed a concern that, under "F" Cause, there may be an argument that he is barred from building on his lot. The provision in question, as I understand it, is provision 19.72.030, "Development Standards," and under that, paragraph 2(b), which says: "If-- Lots of record that meet underlying

minimum lot size requirement. If the underlying zone permits a minimum lot size of smaller than one acre, then a lot of record, approved prior to the effective date of the ordinance codified in this chapter, that meets the minimum lot size requirement set forth in the underlying zone district, shall have a minimum lot size of one-half acre." Brighton Corporation stipulates, and I think both the parties stipulate, that this lot was created prior to the effective date, is greater than one-half acre and, therefore, would not be precluded from building. And we stipulate further that you may include such a provision in the final order so that that could be shown to the county.

I should note that it is a condition of this settlement for Ward that if the county takes a different position, not withstanding that, and refuses to recognize that, then the settlement is not effective and Mr. Ward would be back in his prior position.

Did I state that correctly?

MR. PARRY: Yes. I'm wondering whether we need to go that far on it, though. It may be that we can make some sort of an adjustment to build on. There is--

THE COURT: You need to be sure your voice is being heard clearly, Mr. Parry.

MR. PARRY: Yeah, I'll stand. I'm not sure we want to go that far back, but--

THE COURT: Well, as I understand that provision, what they're saying is, you will cooperate with the grandfather status that was granted to that lot at an earlier time.

MR. JARDINE: Here is the issue. We--that I think we want to be clear on--we do not intend, have no desire to have Mr. Ward adversely affected by that requirement.

THE COURT: Sure.

MR. JARDINE: And we'll stipulate and have entered into an order any way to make sure that that requirement doesn't bar his being able to build. We--what the agreement is, however, is that all these prior plans, which are a source of contention between the parties, get withdrawn and--

THE COURT: Right.

MR. JARDINE: --that only the plans filed are ones we've approved and you've approved, and that we understood, if that was taken care of, that wasn't a problem. So that's why we structured it that way.

MR. PARRY: Yeah. And our worry is that if all the plans are withdrawn--

THE COURT: Uh-huh.

MR. PARRY: --that the county will then say this is something new, and we readdress this issue. You know, if we could get an order from the Court that says the Court has found that it fits within that exception, therefore, can--you know, anything--we're not adverse, obviously, to

withdrawing the plans. We just want to build the cabin.

THE COURT: You just don't want to be prejudiced by that withdrawal, in the event that they say you're starting afresh?

MR. PARRY: That's correct. And we're--

THE COURT: Well, and then I think they're--I think Mr. Jardine's position is consistent with supporting that position.

MR. PARRY: I think so. I just wanted it (inaudible).

THE COURT: So, I would be happy to sign a stipulated order that indicates that the withdrawal of the plans is not a withdrawal of the date of the filing, but simply the content of the plans.

MR. PARRY: Yeah. That--that would probably work.

MR. JARDINE: I think that's not a problem and, indeed, I think if we have an order just saying that this is a lot in excess of a half acre and was created prior to the effective date, and the parties stipulate, and the Court so orders that this doesn't bar building on this lot, that's what they really need.

THE COURT: Okay. That would be fine.

MR. PARRY: My only concern, Jim, is I think it's less than a half acre, but (inaudible).

MR. WARD: It's .53.

MR. JARDINE: We agree.

MR. PARRY: Well, that's over.

MR. JARDINE: We agree it's over a half acre, so it's not an issue.

MR. PARRY: Okay.

THE COURT: Okay. All right, fine.

MR. JARDINE: (Inaudible).

MR. HAGEN: It can't be less than (inaudible).

MR. JARDINE: All right. Next, there has been an issue about conforming the legal description of the roadway easement in the Special Warranty Deed to actually reflect the--

THE COURT: To the location.

MR. JARDINE: --that--where it's actually located. And I think we're in agreement that that can be done. And I've made a--the one thing we didn't finally decide is, I've made a proposal that, since they're going to have a surveyor updating his survey, that they get the exact--have him include in his work the exact legal description of the road, and we'll bear the cost of having the new deed prepared.

Next, with regard to Brighton Corporation's waterline easement, which comes across the property, the proposed resolution is that the claim of trespass and relocation would be dismissed, if everything else is resolved; that the parties would agree that there is an 18-foot easement for the waterline, but that Brighton Corporation can only have a

waterline within that easement, no other utilities or other uses; and that the final order would specifically say that Brighton Corporation may go on Ward's property only to repair the--repair and maintain the line, and only upon reasonable notice of when it intends to do so to Mr. Ward.

MR. PARRY: Written?

MR. JARDINE: Written? That's fine, it can be written.

THE COURT: I'm assuming that that would exclude some kind of emergency situation. A waterline--

MR. PARRY: Yeah.

THE COURT: A waterline is something that can have a sudden break.

MR. JARDINE: I assumed that--my use of the word "reasonable"--

THE COURT: Uh-huh.

MR. JARDINE: --I thought meant that if you have an emergency, immediate dealing with it is reasonable--

MR. PARRY: (Inaudible).

MR. JARDINE: --and the only problem is that written notice then makes that more difficult. Any problem with having that clarification?

MR. PARRY: No, that's a fine clarification.

MR. JARDINE: In an emergency, we're able to deal with it immediately.

THE COURT: Yeah, okay.

MR. JARDINE: Further, we have agreed that within that 18-foot easement, Ward may also locate his utilities, one or more of his utilities, if necessary, so long as the location of them and their relationship to the existing waterline meets all applicable regulations, ordinances, and codes. And further, that if any of Ward's utilities will cross the waterline, that Ward will provide, in advance of undertaking any such utility construction, to provide Brighton Corporation with its construction plans so that Brighton Corporation may determine whether the proposed plans may cause injury to Brighton Corporation's waterline.

We want to state on the record what we've advised Mr. Parry--and I think he's agreeable--that it's recognized by the parties that this is a unique waterline, that it's a continuous, high-pressure, high-density, polyethylene line, with special compaction and layering construction, and that if it's crossed by any of--and also that it's sensitive to temperature--and that if it's crossed by Ward, one of Ward's utilities, that it will be completely restored to its compaction and all of the necessary conditions for the maintenance of the line, by Ward, and that--we want to state on the record that, because it's susceptible to injury, because it's a continuous line, a break and patch is not an adequate solution for this kind of line, as opposed to other kinds of lines, so that great care needs to be taken with

respect to that, and so I think the fact that it would have to comply with all applicable regulations, ordinances, and code, and we'd have a chance to review it in advance, would be satisfactory to us. But it's a sensitive issue that I just want to note for the record.

I understand that if all of this is achieved and accomplished and finally resolved, that all other claims between the parties would be dismissed and that a final order would be entered with the Court, setting forth all of the terms of the settlement, attaching the plans, and that giving the parties, giving Brighton Corporation reasonable rights of inspection to ensure compliance in the construction phase with the plans the Court has approved.

And we can work--I'm just saying reasonable now, the details of which, but, I mean, we're talking about notice and reasonable time and that sort of thing.

THE COURT: All right.

MR. JARDINE: I believe that states the agreement.

THE COURT: All right. Mr. Parry, you've heard the agreement, do you concur?

MR. PARRY: (Inaudible).

MR. JARDINE: Well, I mentioned it.

MR. PARRY: Oh, did we you? Okay.

MR. JARDINE: Let me just be clear, because I cited the three exceptions.

MR. PARRY: That's right, that's right. Okay.

MR. JARDINE: Okay.

THE COURT: Keep your discussions audible to the record.

MR. PARRY: Yeah. There are only two things, and one of them just came up this morning, and that's to have an architect sign. My understanding is to have a certified engineer--that's the one who's going to really draw the site plan--and I wanted to make sure that was no problem--a certified engineer on the site plan.

MR. JARDINE: And--

MR. PARRY: It's really not an architect's--you asked--

THE COURT: It's not an architect's drawing, right?

MR. PARRY: That's right.

MR. JARDINE: Can I just ask just this question?

THE COURT: Yes, certainly.

MR. JARDINE: We--this hasn't been discussed.

UNIDENTIFIED: (Inaudible).

MR. JARDINE: Let me just clarify this. Are you talking about the site plan, without a rendering of the cabin on it?

MR. SHAW: No. The cabin (inaudible).

MR. JARDINE: Don't we need, any time the cabin's shown on the site plan, to also have the--excuse me--to also have the architect sign it, so that he's certifying where the

grade elevations are?

MR. SHAW: That wouldn't be a problem.

MR. JARDINE: To have both? Okay. That's fine.

MR. PARRY: Your Honor, I don't know if you remember Mr. Kimball Shaw?

THE COURT: Yes, I do remember. I've known Kimball Shaw a substantial period of his life.

MR. PARRY: Oh.

THE COURT: We also have been members of the Virginia Heights Tennis Club, where Mr. Shaw's father was somehow invested with the presidency for about a third of his life, but even there. So, I--but I'm not personally acquainted with Mr. Shaw, other than that. I wouldn't describe it as social--it's casual.

MR. JARDINE: Before you get to the calendar, I forget two other things, Your Honor, in trying to rush this. One of the issues is whether the road would be paved. It's our understanding that if this goes through, we would pave the road, at Brighton Corporation's expense.

And we raised an issue, and it's one that we raised at the end, and there's some confusion about it. So, this is more to get clarification. We think, at one point, a conditional use permit was sought for this building, which we understand, maybe correctly or incorrectly, would permit it to be a bed and breakfast, and we just think you get a

permitted use permit, and we'd like to just be clear.

MR. PARRY: I think that's one of the statements in the letter.

MR. JARDINE: So you're fine on that?

MR. PARRY: So, we're (inaudible). Yeah.

MR. JARDINE: I mean, I don't think we're in disagreement, because I don't think they intend to use anything--than as a family cabin, but we just need to be clear on that issue. Having stated those then, we're back to you.

THE COURT: So you are clear on that, Mr. Parry, this (inaudible)?

MR. PARRY: Yes, that my understanding was the county said, get a conditional use, a permitted use, you know, that's fine to put a cabin up there.

THE COURT: Okay. There is no intent to use this at any time--

MR. PARRY: As a bed and breakfast?

THE COURT: --as a bed and breakfast?

MR. PARRY: No, no.

THE COURT: Okay. All right.

MR. PARRY: The only other thing--the only one thing was where you were talking about determining the waterline. I just want it--made it clear to its prior condition.

THE COURT: That's what they're expecting, yes.

MR. JARDINE: That's what I understand, yes.

MR. PARRY: Yeah. It just was--it came out a little differently.

THE COURT: Okay. Now, you can go ahead, Mr. Parry.

MR. PARRY: Oh, yes. My only other thing is the time for trial, if necessary. I'm hoping that you'll have two days sometime in late April or early May.

THE COURT: Well, let's talk about--

MR. PARRY: Hopefully, we won't need it, but--

THE COURT: Okay. Let's talk about that. Let me ask this--when would you be aware of whether you might want those days? How soon?

MR. PARRY: Well--

THE COURT: Right before the trial?

MR. PARRY: Right before. It's going to take about 30 days, this is what we're--that gives us a little leeway, but 30 days to prepare the plans, to have an architect draw the plans. Brighton has said that they would review them within seven days. What we're really up against is like a June 1st building permit date. It takes about 30 days in the county. So, we would like to be able to get these to the county by May 1st. June is when the building season starts, and we'd like to be ready to go by then.

THE COURT: Okay.

MR. PARRY: That's the only reason why I'm asking for

some sooner date, but we don't want to go through another building season.

THE COURT: Okay. Well, I'll tell you what I will do. I'm anticipating this to be a resolution of the case and, certainly, if it isn't, it's going to be an inconvenience to me, at that time, because in the interim I will have placed other matters on my calendar.

MR. PARRY: Uh-huh.

THE COURT: And the only thing I will say now, why don't we just set a date for one of those times, so that we're all working upon the same page, but, hopefully, I guess, we'll not have to use it. I would say probably we ought to go to April 22nd. Is that convenient to both of your calendars?

MR. PARRY: That's fine with mine.

MR. JARDINE: Give me just one second, Your Honor.

UNIDENTIFIED: (Inaudible).

MR. JARDINE: Let me--I need to clarify something that I probably misstated. The checklist that I understand that Mr. Richardson and Mr. Shaw talked about, actually has some steps along the way, as I understood it. That is, that there are some things that you get before you get the final set of plans. Now, maybe I'm misunderstanding it, but if that's--that may or may not change the dates, but if we get all of that in seven days, that--I'm being told that may not

be adequate. Is that a correct understanding of the checklist?

MR. PARRY: The way, as I understood it, that Neil Richardson had it, was that when he's working with a client, they do it in stages. Most of those stages have been accomplished. What needs to be done now is the final drawings are drawn.

MR. JARDINE: All I'm--well, I (inaudible).

MR. PARRY: Well, I'm not agreeing to the stages.

THE COURT: What you're agreeing to is the final drawings will all be presented?

MR. PARRY: That's correct.

THE COURT: Uh-huh.

MR. PARRY: And it's, you know (inaudible).

UNIDENTIFIED: (Inaudible).

MR. JARDINE: I don't know what--I think--I would say this, Your Honor, they're a little concerned that my saying if we get all the sets of plans at once, seven days may be slightly ambitious.

THE COURT: Right. That's--

MR. JARDINE: We could have like 14, and I'd like to be honest with you, my client was just--had in mind--and I think, sort of fairly, that they would see the site plan before they saw the final plan, which is sort of a staging concept, but I said to them, that's up to Mr. Ward, and if

he wants to submit it all at once, there may be benefit in submitting--

THE COURT: Sure.

MR. JARDINE: --one of those first, but that's his call, not ours, but we will need maybe slightly more than seven days to review it.

THE COURT: Okay. Well, I'm (inaudible).

MR. PARRY: The (inaudible) last night.

THE COURT: That's not going to create any problem if they're--if you have the plans within seven days from now.

MR. PARRY: Oh, no, no, it'll--how long will it take you to do them?

MR. SHAW: Well, the sub-plan would be the most important drawing, and that's actually a good idea to submit that as soon as possible and then continue (inaudible).

MR. PARRY: Okay. One of the things we discussed last night, because we had the two architects together, was that really this was not going to be a "let's just pack up and leave each other and ignore each other for a month," but that they could be working together and making sure things are acceptable during this whole time period. I don't see it as just dumping a set of plans on them in 30 days.

MR. JARDINE: I would say this, Your Honor, we're willing to review plans along the way, like the site plan, when we get them, and we turn then around in a reasonable

time frame, and if we could have--if that happens--

THE COURT: How about not less that 14 days?

MR. JARDINE: From the time we get the plans? Yes.

MR. PARRY: That's okay.

THE COURT: On any plans that are submitted. That seems to be reasonable, and then don't just send them all at once, send them as soon as they're done.

MR. PARRY: They'll certainly do that.

THE COURT: Yeah, okay. All right.

MR. PARRY: The 22nd and 23rd is okay with us, Your Honor.

THE COURT: April 22nd and 23rd?

MR. JARDINE: Do you have a week later? No, no, that--

THE COURT: I have the 29th and 30th, but I have a three-day jury trial starting on Wednesday the 28th.

MR. PARRY: Mr. Shaw said that he could get them done by the 7th, so that would give us 14 days.

MR. JARDINE: I'll keep the 22nd or the 23rd, it was a (inaudible).

THE COURT: Well, I can go to May 6th or 7th.

MR. JARDINE: I think they're worried about that bumping into the 30 days they think it takes to get to the county, so--

MR. PARRY: And since--yes, we're the ones who are asserting the pressure. We'll put pressure on getting the

plans done.

THE COURT: Yeah. I might say, you've asserted pressure for about three years, and you haven't been a part of it, but I'm not any longer sensitive to your pressure on that, in that respect, because I've had enough of it. So--

MR. PARRY: I was hoping that we wouldn't get into--

THE COURT: Yeah.

MR. PARRY: --those types of things.

THE COURT: Okay.

MR. JARDINE: Let me ask, Your Honor, we have--

THE COURT: Well, here's the problem. I have a three-day jury trial set on the 28th, right now. It's a `96 case, I don't know anything more than its number--I except it will go.

MR. PARRY: We said we'd meet the 22nd, we'd meet that day.

MR. JARDINE: I'm just getting a conflict here from Mr. Hagen. I would--

THE COURT: That you have?

MR. JARDINE: No, that we have for the 22nd. If there was a chance we could--if you could--if we could call back and call the lawyers on that three-day trial and, if it looks like it has a chance of settling, have the 29th and 30th as a--

THE COURT: I'll give you the 29th and 30th right now--

it's just that I may have to deal with it.

MR. JARDINE: I understand, Your Honor. I'm sorry, it's a conflict with my client.

THE COURT: Okay.

MR. JARDINE: So, if we could hold that and we'll find out from Taunie who the (inaudible).

THE COURT: Well, don't worry about that right now. I don't want that. I mean, let them settle their own case.

MR. JARDINE: All right.

THE COURT: Your number is 94 anyway, so I would normal try it ahead of another one, except that this has been moved so many times, I may not have quite the sympathy that I might have had previously, and I don't mean to be unkind about that.

MR. PARRY: All right.

THE COURT: Because I have now three days that are just given back to me, and I don't have another case in those three days, which is not very happy--you know, even though I might have other things to do, I do have plenty to do, but it's not a very happy thing to save those days for you and gotten the other cases cleared out. Okay, that's enough, in that respect.

Have you stated your stipulation to your satisfaction, Mr. Jardine?

MR. JARDINE: **I have.**

THE COURT: Mr. Parry, do you concur?

MR. PARRY: Yes.

THE COURT: All right. Let's have--who, on behalf of Brighton Corporation, should be placed under oath?

MR. JARDINE: Mrs. Barton.

THE COURT: All right. Will you stand and raise your right hand, please? And, Mr. Ward, will you likewise stand and raise your right hand, please?

COURT CLERK: Do you and each of you solemnly swear the testimony you're about to give in the case before the Court will be the truth, the whole truth, and nothing but the truth, so help you God?

MRS. BARTON: Yes.

MR. WARD: Yes.

THE COURT: All right. You've heard the statement of the stipulation by your attorney and also by Mr. Parry. Do you agree to the terms and conditions of this stipulation and agree to implement them?

MRS. BARTON: Yes.

THE COURT: All right. Likewise, you've heard the statement of the stipulation now concurred and by all, including Brighton Corporation. Do you agree to the terms and conditions of the stipulation and to implement them, Mr. Ward?

MR. WARD: Yes, yes.

THE COURT: Thank you each. All right, based then upon that stipulation, the Court will strike the trial date anticipating, hopefully, that the whole matter will be resolved upon this stipulation. The Court has continued a trial date, in anticipation that the matter will be resolved, however, to April 29th and 30th, if needed, for the trial. All right?

MR. JARDINE: Thank you, Your Honor.

THE COURT: Thank you each for your appearances. Court's in recess.

CERTIFICATE

STATE OF UTAH)
) ss.
Salt Lake County)

I, Debra H. Peterson, do hereby certify that the foregoing pages, numbered 1 through 25, contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability from the tapes furnished to me.

DATED: March 25, 1999.

Debra H. Peterson

I, Lanette Shindurling, Certified Shorthand Reporter, and Notary Public for the State of Utah, do hereby certify that the foregoing transcript prepared by Debra H. Peterson was transcribed under my supervision and direction.

Lanette Shindurling

My Commission Expires:

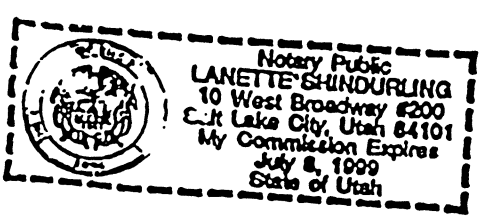


Exhibit D

RAY, QUINNEY & NEBEKER
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October 28, 1998

Brent D Ward, Esq
PARRY LAWRENCE & WARD
60 E South Temple, #1270
Salt Lake City, Utah 84111

Re Brighton Corporation v Ward

Dear Brent

As I indicated to you in our telephone conversation of last week, Brighton Corporation has decided to make one last effort to resolve the ongoing dispute before proceeding to motions[1] and trial in this case I will not repeat all of the issues that have built up and which are set out in prior letters, except to note that the recent discovery by Brighton Corporation that since April 1996 Mr Ward has been seeking approval from Salt Lake County Development Services not only for the Chalet Plan but also for the Designer and Cottage Plans, all of which are now on file at the County, has added to the skepticism of my clients

On behalf of Brighton Corporation, we offer to resolve all issues and approve the Chalet Plan on the following principles

[1] As I have indicated, and so there is no question, by proceeding with this proposal Brighton Corporation is not abandoning or waiving in any way its position that it is entitled to have Mr Ward either have the plans signed and verified by an architect or reimburse Brighton Corporation for its expenses and professional fees in reviewing further plans If we fail to reach agreement, then we will proceed to file our motion for partial summary judgment that requiring verification by an architect and reimbursement of reviewing expenses is reasonable. We are also considering including as a ground for that motion that consideration of the standards of the Foothill Canyons Overlay Zone is reasonable

1. We wish to resolve all issues that now or may exist between these parties, so that to the fullest extent possible there is no risk of future litigation between them except with respect to compliance with the Court's Orders There should be no ambiguities or open issues in the final resolution.

2. Any settlement must be fully and completely documented and incorporated in an order of the Court that includes all approved plans, with continuing jurisdiction in the Court to monitor compliance with the order and with a reasonable right in Brighton Corporation to inspect for compliance.

In proposing this resolution, Brighton Corporation has considered and re-examined only the Chalet plans of June 3, 1998. Based on those plans, Brighton Corporation would give its approval and resolve this entire issue only if the following changes were made or conditions were met (most or all of which are not new). Brighton Corporation has highlighted points on the maps and site plans, copies of which are included, which must be removed, as well as inconsistencies in the plans that must be corrected

1 FRONT PORCH ON NORTH

We have repeatedly asked for detailed drawings of how Mr. Ward proposed to accomplish the design and placement of a porch on the north side of the cabin, as Brighton Corporation has been skeptical that it could be done. To date we have not received the requested detailed drawings.

We do not believe that the entire north side of the cabin can be graded down to the 116' elevation shown on the topography map, so that the floor of the porch and the steps leading up to the porch can be placed lower than the first floor of the cabin, which has been agreed upon and set at 116' 10." Cutting the mountainside down as much as five feet, then trying to hold it with a retaining wall on the east and grading away from the north side of the porch is not feasible. This is not placing the cabin into the slope of the mountain, but rather cutting down the mountain to fit in a porch. This is also important because of the very real potential impact on Brighton Corporation's waterline.

Brighton Corporation has suggested that the cabin be entered from the east side of the cabin into the second floor, which, particularly in the winter, would provide an easy access to the cabin from the circular driveway and parking, or from the patio on the west side of the cabin.

2. BRIGHTON CORPORATION'S WATERLINE AND EASEMENT

The existence and present location of Brighton Corporation's waterline and easement must be confirmed so there is no future dispute about it.

Brighton Corporation's waterline has never been moved, only lowered into the ground, and extended by Silver Lake Company to reach their new main line. Mr. Ward has shown Brighton

Corporation's waterline in several different locations on different maps and site plans, none correctly Given these issues, Sneidman and Assoc. with the help of Steve Jorgenson, Silver Lake Company watermaster, prepared a survey in June 1994. As part of the resolution, the parties must agree on the accuracy of that survey, and Mr. Ward will remove any notations from any plans he has submitted or will submit to the County or other agencies questioning in any way the right or location of that easement. The notations made by Kirk Morgan of Sneidman & Assoc. and Steve Jorgenson, watermaster, are the only notes concerning Brighton Corporation's waterline that may appear on any site plan included with final plans.

Finally, the proposed waterline to Mr. Ward's cabin must be located further south than Brighton Corporation's valve connection to the Silver Lake line. Mr. Ward must document the exact location of his waterline and valve, as directed or approved by Mr. Jorgenson.

3. WARD/COATS SEWER LINE

The words, "Brighton Corporation disputed sewer line placed Aug 1997 outside provided easement" is to be removed from all site plans. Brighton Corporation's sewer line was placed by Solitude Improvement District within the easement as shown on "Grant of Easement for Construction and Maintenance" dated May 6, 1994

No provision was made in the Special Warranty Deed or Property Use Agreement for Ward/Coats utilities to be placed in the right-of-way running along Forest Alley (vacated). Dransfield's utilities are located in the north side of the easement, Brighton Corporation's sewer line on the south side, and the center portion is for utilities that will be installed on the property between Dransfield's and Brighton Corporation's at some future time.

Mr. Ward's sewer line should be shown on site plans running along the west end of his property from the cabin to the main sewer connection on Prospect Ave. It thus would run beneath Brighton Corporation's waterline at one point only, and that should be at the west end of Brighton Corporation's waterline

Mr. Ward will need to provide Brighton Corporation with a "Grant of Easement for Construction and Maintenance" issued by Solitude Improvement District to him, showing the exact location of his sewer line.

4. PATIO

In reviewing the proposed patio in the June 3, 1998 plans, Brighton Corporation understands the proposal to include a very substantial excavation of the ground on the south to accommodate the proposed patio. Brighton Corporation cannot approve such a disturbance to the land.

Brighton Corporation does not approve 758 square feet of concrete, or almost 2/3 the size of the entire cabin, for a patio as proposed in your letter of June 3, 1998. Although the Special Warranty Deed specifically calls for decking, in the meeting of January 1997 in Neil Richardson's office, Brighton Corporation agreed to allow Greg to use a concrete patio rather than wood decking if the area on the south was cut down approximately one-third. That was discussed by the architects in order to avoid a deep cut of over eight feet in the mountain. Greg has not complied with his part of the agreement.

The patio on the south of the cabin may be 25 X 12 feet, or 300 square feet. This would necessitate only a 4-5 foot high retaining wall, without grading the ground in any significant way, instead of an 8-9 foot high retaining wall. This amount would be in addition to the concrete patio on the west of the cabin which is shown as 29 feet X 10 feet, or 290 square feet. This is a total of 590 square feet of cement patio, or half again the square footage of the cabin, plus 48 square feet of decking off the second floor.

5. PARKING

The site plan shows two proposed areas for parking located east of the circular driveway with the inaccurate note "existing parking." The proposed parking is located in the Buffer Zone, which may not be used for parking, as outlined in the Property Use Agreement. Parking must be on or west of the circular driveway

6. SET OF EXTERIOR ELEVATION DRAWINGS AND ELEVATIONS

Drawings of the front, rear, and both sides of the chalet cabin showing the relationship of the cabin to the existing topography of the land must be submitted to Brighton Corporation. These drawings are to be the same type of drawings that have been submitted with other plans delivered to Brighton Corporation in December 1993, March 1994, July 1995 and August 1995. We have not received the exterior elevation drawings with any of the Chalet plans, though we have asked for them several times.

The drawings of the contour of the land should, of course, be the same as previous elevation drawings made by Kimble Shaw, but the position of the cabin will be different as the Chalet is built into the slope of the mountain with the upper surface of the first floor at 116' 10", and with no basement.

As a result, the drawings will show the southeast corner of the upper surface of the first floor 7-8 feet into the ground, the northeast corner 4-5 feet into the ground, with as little disturbance to the existing grade as possible. This would be in addition to the footings and crawl space which are under the first floor. We have agreed that the ceiling of the first floor of the cabin may be 9 feet in height if the first floor of the cabin is built on grade on the west and into the slope of the mountain.

7. TOPOGRAPHY MAP AND SURVEY

As part of any final set of plans, Mr. Ward must include a copy of the original Francom Topography Map showing the 2' contour intervals across the south side of the property. As Francom did not include Brighton Corporation's waterline on the topography map, Mr. Ward should include the transparent copy of the Sneidman Survey in the exact scale as the topography map showing the relationship of Brighton Corporation's waterline, the circular driveway, buffer zone, and present parking area, which can be superimposed onto the topography map.

A footprint of the cabin and patio should be drawn on the map using a dotted line or another method that does not obscure the contour lines on the map.

8. ROADWAY

As previously discussed, as part of the resolution, the legal description of the road should be changed to match the physical location of the road maintaining the 20' width. In addition, Brighton Corporation may proceed to asphalt the road for safety and emergency vehicle access.

9 ADDITIONAL ITEMS

a. There needs to be a clear definition of the meaning of the phrase, "construction grade 116", which appears at numerous places in the plans. This is ambiguous.

b. All necessary corrections should be made to Techni-Graphic Services sheets 1-5 for front porch, retaining walls, patio, doorways, etc. On sheet 5, the elevation of the patio should be given with the other elevations, and the height of the crawl space should be given as "36" maximum," instead of "36" min."

c. Several corrections need to be made to the General Notes which are included as the last page of the plans.

(i) The words "which is to be no higher than 36" should be added to #13, which refers to the crawl space.

(ii) #37 reads: "Smoke detectors required at each bedroom, at hallways leading to bedrooms, at every floor level, at the top of each stairway on any floor without bedrooms, and in rooms serving bedrooms where the ceiling height of the room is 24" or more greater in height than the bedroom served from such room." As the cabin is to have only two floors with no loft or basement, and as your plans show one set of stairs and bedrooms on the 2nd floor only, this note is ambiguous and should be corrected.

(iii) OTHER reads: "No stumps, roots or vegetation shall be removed from the soil of B/C's waterline easement except as may be necessary for placement of utilities, water and sewer." The word 'organic material' should be added after the word "vegetation", and the words "except as may be necessary for placement of utilities, water and sewer" must be omitted.

d. Brighton Corporation was not given a copy of the "Support Documents for Gregory M. Ward Cabin", which are attached to the Chalet Plans at Salt Lake County Development Services. Mr. Ward will need to correct each page of this document to bring it into conformity, and submit a copy to Brighton Corporation for approval.

The first page, which is Mr. Ward's letter of August 18, 1998 to Development Services for Planning and Zoning, notes that he is enclosing (12) site plans showing electrical-water-sewer service on the property. At the present time there is no electrical, water, or sewer services on the property. This needs to be corrected or explained.

The August 18 letter also indicates that he is enclosing two copies of the building plan elevations. We think these must have been the copies of the Cottage Plan elevations which we found in the file with the Chalet plans. The two sets of plans are not interchangeable for Brighton Corporation's review.

In that letter, Greg also includes three maps to show "Drainage," "Course of Construction Fencing," and "Area of Ground Disturbance/Grading." Parking is shown in the two areas of the buffer zone. The position of the sewer line and water lines need to be corrected. Construction fencing must run the entire west side of the buffer zone and must run along the south side of Brighton Corporation's waterline easement except where the easement is across the circular driveway. The enclosed map showing ground disturbance/grading is highlighted in yellow showing those areas where there may not be any grading and which must experience as little disturbance as possible.

It also appears that a "color board for exterior finish" was included with the Support Document submitted to the County August 18, 1998. Mr. Ward has not given Brighton Corporation this material, but as this is a part of the design of the cabin, this also needs to be submitted for approval to Brighton Corporation. In the past, we have indicated that this will likely not be an issue for Brighton Corporation.

CONCLUSION

All of the drawings and documents requested must be furnished. Each item noted as incorrect must be remedied as outlined. All additions, deletions, and adjustments must be addressed and incorporated into a complete and truthful set of plans. After Mr. Ward has made the necessary corrections, Neil Richardson will be asked to verify them for accuracy. If approved we will prepare a settlement agreement based on the plans. Once the Court has entered an Order, Mr. Ward may then

submit those Court-approved plans to Salt Lake County Development Services for a building permit in place of the three plans, which are now on file there.

If the plans are not corrected in every detail as we have suggested, and all drawings and documents are not submitted as requested, approval cannot be given.

We hope this proposal will result in a resolution. Given the history, Brighton Corporation does not want to negotiate these points. However, I certainly am willing to clarify any aspect of this letter.

We look forward to hearing from you.

Very truly yours,

RAY, QUINNEY & NEBEKER

Scott A. Hagen
for James S. Jardine

cc Sam Clark
433379

Exhibit E

RAY, QUINNEY & NEBEKER
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210 FIRST SECURITY BANK BLDG
92 NORTH UNIVERSITY AVENUE
PROVO UTAH 84601-4420
TELEPHONE (801) 226 7210
FACSIMILE NO (801) 375-8379

ALONZO W WATSON JR
STEPHEN B NEBEKER
HERSCHEL J SAPERSTEIN
DON B ALLEN
CLARK P GILES
ROBERT M GRAHAM
NARRVEL E HALL
HERBERT C LIVSEY
PAUL S FELT
D JAY CURTIS
GERALD T SNOW
ALAN A ENKE
WESTON L HARRIS
JONATHAN A DIBBLE
SCOTT HANCOCK CLARK
STEVEN H GUNN
JAMES S JARDINE
ALLAN T BRINKERHOFF
JANET HUGIE SMITH
DOUGLAS MATSUMORI
ROBERT P HILL
FLOYD ANDREW JENSEN
DAVID K LAURITZEN
ALLEN L ORR
A ROBERT THORUP
JOHN P HARRINGTON
LARRY G MOORE
B JANELL GRENIER
BRUCE L OLSON
JOHN A ADAMS
DOUGLAS M MONSON
CRAIG CARLILE
JAMES M DESTER
ELLEN J D TOSCANO
KEVIN G GLADE
LESTER K ESSIG
IRA B RUBINFELD

STEVEN T WATERMAN
STEPHEN C TINGEY
JOHN R MADSEN
KEITH A KELLY
MARK M BETTILYON
RICK L ROSE
RICK B HOGGARD
LISA A YERKOVICH
BRENT D WRIDE
LORIN E PATTERSON
MARY SHEA TUCKER
MICHAEL E BLUE
SCOTT A HAGEN
STEVEN W CALL
CAMERON M HANCOCK
ELAINE A MONSON
SYLVIA I IANNUCCI
KATIE A ECCLES
CALVIN C CURTIS
R GARY WINGER
ROBERT O RICE
THOMAS A MECHAM
ARTHUR B BERGER
FREDERICK R THALER JR
JOHN W MACKAY
ERIC D BARTON
McKAY M PEARSON
MARK W PUGSLEY
JOHN D MORRIS
STEVEN G BLACK
JONI J JONES
DANIEL W WALKER
PAUL C BURKE
ELAINA M MARAGAKIS
JOAN M ANDREWS
D ZACHARY WISEMAN
DAVID O GIBBON

OF COUNSEL
M JOHN ASHTON
ROBERT A ALSOP
VALERIE A LONGMIRE

February 22, 1999

Douglas J Parry, Esq.
PARRY, LAWRENCE & WARD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Re: Brighton Corporation v. Ward

Dear Doug:

I am writing on behalf of Brighton Corporation in response to your letter of February 5, 1999, and with respect to the plans that accompanied that letter. I also acknowledge our subsequent receipt of two additional drawings last week that you advised me are "corrected" drawings prepared by Kimble Shaw. Additionally, on February 18, 1999, we received an additional 13 (thirteen) pages of plans that we understand are a duplicate of the plans already provided on February 5, with red dots marking your ameliorative changes, along with an accompanying letter of explanation. Brighton Corporation has carefully reviewed the plans signed by Kimble Shaw and consulted with Neil Richardson, a licensed architect, and has directed me to respond on its behalf. For the reasons set out below, Brighton Corporation does not approve these plans.

1. The Plans are Incomplete and Lack Necessary Detail. The plans do not comply with the Court's grant of Brighton Corporation's recent motion for partial summary judgment. The Court's order provides that Brighton Corporation may require, as a condition of further review, that the plans be signed by a licensed architect. The plans Brighton Corporation received include only three drawings signed by Kimble Shaw and those three drawings contain little of

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 3
CASE NO.

the detail Brighton Corporation needs to remove the ambiguity from the plans. Although you have objected that there is not enough time for Shaw to prepare a complete set of plans, this requirement was first imposed in a letter dated June 10, 1998, and was verbally requested long before then. In fact, it was initially suggested by Judge Young approximately one year ago.

The plans that were prepared and signed by Kimble Shaw are not sufficiently detailed for Brighton Corporation to determine whether they are acceptable. For example, Brighton Corporation has consistently requested that Ward provide a site plan with contour lines that are clearly labeled with correct elevations. The site plan should include the exact elevation of each outside corner of the structure (including the base of retaining walls and footings). Elevation drawings must also include exact elevations for each outside corner. Moreover, the elevation drawings must include the architect's rendering of how the building fits into the existing grade on all four sides. The heavy black line on the elevations signed by Shaw is insufficiently detailed for Brighton to make its determination. The original plans considered by the Court in September 1994 showed how the cabin would fit into the existing landscape. These elevations do not include that detail and for those reasons, among others, the submitted plans are unacceptable.

2. The Plans do not Adequately Clarify the North Porch. The plans do not show how a porch and the main entrance can be placed on the north side of the building without an excessive cut in the mountain and disturbance to Brighton Corporation's waterline and waterline easement. This issue is complicated by Ward's failure to submit plans that are sufficiently detailed. The lack of contour lines and exact elevations, as well as the failure to include a drawing showing how the porch and entryway fit into existing grade, makes it impossible for Brighton Corporation to determine whether the structure will disturb its waterline. This issue has been discussed in several letters in the past. It is critical that Kimble Shaw address this issue with a detailed and specific drawing.

Brighton Corporation continues to believe that the entrance should be moved to the east side of the cabin at the second floor level or to the patio on the west side. Either option avoids the difficulties caused by trying to force a north-side entrance.

3. The Patio on the South Side may require an Excessive Cut. The patio on the south and west sides of the cabin is too large and may require an excessive cut in the mountain. Brighton Corporation does not approve 758 square feet of concrete, or almost 2/3 the size of the entire cabin, for a patio as stated in your plans. The Special Warranty Deed calls for decking, not a concrete patio. In January 1997, the architects discussed reducing the size of the patio by one-third in the southeast corner in order to reduce the size of the retaining wall that would be required in the southeast corner. The plans ignore this consensus. Moreover, Kimble Shaw's drawings do not address the patio in any detail. As with the porch on the north side, this prevents Brighton Corporation from being able to determine whether the cut in the mountain is excessive. A retaining wall of more than six feet would violate the standards set out in the Foothills and Canyons Overlay Zone. Brighton Corporation suggests now, as it has in the past,

that the patio on the south be reduced from 39 x 12 to 25 x 12, which would necessitate a much smaller cut in the mountain and still provide for a very sizeable patio In the alternative, the patio could be stepped down as it runs west along the south side of the cabin

As Brighton Corporation has indicated many times, detailed and complete plans signed by an architect are necessary to avoid any further disputes should acceptable plans ultimately be approved by Brighton Corporation Such plans would then be available for inclusion in a court order and for clear and objective compliance and enforcement thereof.

Brighton Corporation did not review all of the drawings submitted In keeping with our prior motion and the Court's direction, Brighton reviewed only those drawings signed by Mr. Shaw. For the reasons stated above, those drawings are not acceptable to Brighton Corporation.

Very truly yours,

RAY, QUINNEY & NEBEKER

Scott A. Hagen

for James S Jardine

cc Brighton Corporation

451275

Exhibit F

Deer Crest Associates, I, L C LCC Properties Group, L C , 136 Heber Avenue, Suite 308, Park City, Utah 84060
Contact Renee Norstrom Phone No (435) 655-8822 FAX (435) 655-8120

DEER CREST

INITIAL PRELIMINARY PLAN CHECK LIST

Property Owner's Name_____

Mailing Address_____

	Area Code	Number	Area Code	Number
Business Ph	_____ -	___-_____	Home Ph	_____ - ___-_____

FAX No _____ - _____

Lot or Parcel Number_____

Address of Property_____

Please provide the following sheets for design review

			Included	Missing
I	**Sheet 1 - Existing Conditions**		☐	☐
	A	Consultants/Engineers		
		1 Licensed Survevor	☐	☐
		a Name_____		
		b License No _____		
		2 Licensed Landscape Architect	☐	☐
		a Name_____		
		b License No _____		
	B	Scale 1" = 20' -0"	☐	☐
	C	Plan must include		
		1 2'-0" - Contours	☐	☐
		2 Natural Site Features	☐	☐
		3 Existing Vegetation	☐	☐
	D	Scheduled visit by design review committee to verify existing conditions map in the field		
		1 Date Contacted_____	☐	☐
		2 Person Contacted_____	☐	☐
		3 Date of Scheduled Visit_____	☐	☐
II.	**Sheet 2 - Site Plan**		☐	☐
	A	Scale 1" = 20'-0"	☐	☐
	B	Show dwelling coverage	☐	☐

			Included	Missing
	C.	Show other impervious coverage	☐	☐
	D	Dwelling SF*_____ Impervious Coverage SF_____Total impervious cover SF_____ *(Footprint with eaves, overhangs, outbuildings)		
III	**Sheet 3 - Grading/Drainage Plan**		☐	☐
	A.	Scale 1" = 20' -0"-	☐	☐
	B.	Consultants/Engineers		
		1 Provide the following names		
		a. Licensed Landscape Architect	☐	☐
		Name_____	☐	☐
		License No _____	☐	☐
		OR		
		b Licensed Civil Engineer	☐	☐
		Name_____	☐	☐
		License No _____	☐	☐
		c Soils Engineer	☐	☐
		Name_____		
		Contact Person_____		
		Phone No _____		
		FAX_____		
		2 Attach Soils Engineer's report on your lot	☐	☐
	C	Plan Must Include		
		1 Existing and proposed Contours (2'-0" intervals)	☐	☐
		3 Finish Pad Elevation	☐	☐
		4 Slopes with top and bottom elevations	☐	☐
		5 Surface and sub-surface drainage with top of grade and invert elevations	☐	☐
		6 Retaining walls with top and bottom of wall elevations	☐	☐
		7 Locations and mountings for site objects, planters, accessory buildings and walls	☐	☐
		8 Surface drainage or paved areas sloped as per UBC standards	☐	☐
		9 Surface drainage of landscape and planted swales slope to	☐	☐
			Applicable	Not Appl
		10 Lots unable to meet minimum surface drainage systems must use a sub-surface	☐	☐

drainage system (See Design Guidelines)

			Included	Missing
IV	**Sheet 4 - Landscape Plan**		☐	☐
	A.	Scale 1" = 20' -0" ☐	☐	☐
	B	Plan must include		
		1 List of new plant materials	☐	☐
		2 Site and location of plant materials	☐	☐
		3 Areas shown to be irrigated by spray	☐	☐
		s f. of spray 1600 SF MAX		
		4 Areas shown to be irrigated by drip	☐	☐
		s f. of drip area 4500 SF MAX		
V.	**Sheet 5 - Slope Analysis Plan**		☐	☐
	A.	Scale 1" = 20' -0"	☐	☐
	B	Plans must include location of the following grades		
		1 0 -10%	☐	☐
		2. 10 - 20%	☐	☐
		3 20 - 25 %	☐	☐
		4 25 - 30%	☐	☐
		5 30 - 35%	☐	☐
		6. 35 - +	☐	☐
VI	**Sheets 6 - 7 - Site Cross Sections** (Minimum of two)		☐	☐
	A	Scale 1" = 10' -0"	☐	☐
	B	Plan must include		
		1 Height allowed above natural grade by Deer Crest Design Guidelines_____		
		2 Maximum height of structure- from_____ to_____		
VII	**Sheets 8 - 14 - Schematic Architectural Drawings**		☐	☐
	A	Scale ¼" = 1'-0"		
	B	Plans must include the following		
		1 Allowable building s f per Deer Crest Design Guidelines_____		
		Actual building sf _____		
		2 Floor Plans		
		a Main	☐	☐
		b Lower	☐	☐
		c Upper	☐	☐
		3. Elevations		
		a Front	☐	☐
		b Back	☐	☐
		c Side	☐	☐
		d Side	☐	☐
		4 Materials List	☐	☐
		5 Location of Materials Called Out on Elevations	☐	☐

Deer Crest Associates, I, L.C LCC Properties Group, L.C., 136 Heber Avenue, Suite 308, Park City, Utah 84060
Contact: Renee Norstrom Phone No . (435) 655-8822 FAX: (435) 655-8120

DEER CREST

CONSTRUCTION DOCUMENT CHECK LIST

Property Owner's Name_____

Mailing Address_____

	Area Code	Number	Area Code	Number
Business Ph.	_____ -	____-_____	Home Ph.	_____ - ____-_____

FAX No. _____ - _____

Lot or Parcel Number_____

Address of Property_____

Please provide the following sheets for design review

			Submitted	Not Submitted
I.	**Sheet 1 - Existing Conditions**		☐	☐
	A.	Scale 1" = 20' -0"	☐	☐
		Plan must include:		
		1. 2'-0" - Contours	☐	☐
		2. Natural Site Features	☐	☐
		3 Existing Vegetation	☐	☐
II	**Sheet 2 - Site Plan**		☐	☐
	A.	Scale 1" = 20'-0"	☐	☐
	B.	Show dwelling coverage	☐	☐
	B.	Show other impervious coverage	☐	☐
	D.	Dwelling SF*_____ Impervious Coverage SF_____Total impervious cover SF_____ *(Footprint with eaves, overhangs, outbuildings)		
III.	**Sheet 3 - Grading/Drainage Plan**		☐	☐
	A.	Scale 1" = 20' -0"-	☐	☐
		1. Attach Soils Engineer's report on your lot.	☐	☐
	B.	Plan Must Include		

	1.	Existing and proposed Contours (2'-0" intervals)	☐	☐
			Submitted	Not Submitted
	3.	Finish Pad Elevation	☐	☐
	4.	Slopes with top and bottom elevations	☐	☐
	5.	Surface and sub-surface drainage with top of grade and invert elevations	☐	☐
	6.	Retaining walls with top and bottom of wall elevations	☐	☐
	7.	Locations and mountings for site objects, planters, accessory buildings and walls.	☐	☐
	8.	Surface drainage or paved areas sloped as per UBC standards	☐	☐
	9.	Surface drainage of landscape and planted swales slope to	☐	☐
			Applicable	Not Appl.
	10.	Lots unable to meet minimum surface drainage systems must use a sub-surface drainage system (See Design Guidelines)	☐	☐
			Included	Missing
IV.	**Sheet 4 - Landscape Plan**		☐	☐
	A.	Scale 1" = 20' -0"	☐	☐
	B.	Plan must include		
		1. List of new plant materials	☐	☐
		2. Site and location of plant materials	☐	☐
		3. Areas shown to be irrigated by spray MAX s.f. of spray 1600 SF	☐	☐
		4. Areas shown to be irrigated by drip s.f. of drip area 4500 SF. MAX.	☐	☐
	C.	Irrigation Plan	☐	☐
	D.	Landscape Lighting	☐	☐
V.	**Sheet 5 - Slope Analysis Plan**		☐	☐
	A.	Scale 1" = 20' -0"		☐
	B.	Plans must include location of the following grades		
		1. 0 -10%	☐	☐
		2. 10 - 20%	☐	☐
		3. 20 - 25 %	☐	☐
		4. 25 - 30%	☐	☐
		5. 30 - 35%	☐	☐
		6. 35 - +	☐	☐

			Submitted	Not Submitted
VI.	**Sheets 6 - 7 - Site Cross Sections** (Minimum of two)		☐	☐
	A.	Scale 1" = 10' -0"	☐	☐
	B.	Plan must include.		
		1. Height allowed above natural grade by Deer Crest Design Guidelines_____(Show)_____		
		2. Maximum height of structure- from_____ to_____		
VII.	**Sheets 8 - 14 - Construction Documents Complete for Construction**		☐	☐
	A.	Scale ¼" = 1'-0"	☐	☐
	B.	Plans must include the following:		
		1. Allowable building s.f per Deer Crest Design Guidelines_____ Actual building sf _____		
		2 Floor Plans		
		a Main	☐	☐
		b Lower	☐	☐
		c Upper	☐	☐
		3 Elevations		
		a Front	☐	☐
		b Back	☐	☐
		c Side	☐	☐
		d. Side	☐	☐
		4 Sections and Details	☐	☐
		5 Materials List	☐	☐
		6 Location of Materials Called Out on Elevations	☐	☐
VIII	**Written Specifications**		☐	☐
IX	**Material Sample Board**		☐	☐
X	**Colored Elevations or Renderings**		☐	☐
II	**Certificate and Acknowledgment of Acceptance to Exception to Deer Crest Building Permit Policy from Owner and Builder**		☐	☐

Construction Information Submittal

1 Insurance

Requirement not less than $1,000,000 00

a) This insurance shall not be canceled, limited in scope of coverage or non-renewed until thirty days written notice has been given to the Deer Crest Master Association

b) This insurance policy, which names the Deer Crest Master Association as an additional insured is primary and any insurance maintained by such additional insured shall be non-contributing

	Submitted	Not Submitted
Insurance Policy Certificate	☐	☐

Policy Amount $1,000,000 00 required _____

Coverage Dates From_____to_____

Name Insured

_____

Deer Crest Master Association _____

2	Copy of Comments from Municipality Review	☐	☐
3	Site Access Plan	☐	☐
4	Fire Plan	☐	☐
	a The builder shall provide at least one high-capacity 20 lb chemical fire extinguisher to be located near flammable materials storage areas and on each floor level under construction	☐	☐
	b The builder shall maintain the truck within 200 feet of the structure under construction The Builder shall be reponsible to assure that the truck remains operation in winter by using heat tape, glycol or other freeze prevention methods The fire truck shall be tested daily and a record of the test results shall be maintained on each lot for inspection purposes (See Daily FireTruck Test Report)	☐ ☐	☐ ☐
	c Certificate of training The building superintendent or other key construction personnel shall be trained in the operation of the fire truck valves, hydrants and fire extinguishers	☐	☐
	d Record of Weekly Fire Drill Fire drills will be conducted weekly to ensure familiarity with fire control procedures and to assure that all all fire protection equipment is operational (Weekly Fire Drill Report)	☐	☐
	e The Builder will post the phone number of the Wasatch Co Fire Dept on all fire extinguishers Any fires will be reported immediately by Builder's onsite personnel, and any violations of fire control plan standards Any fire related incidents will also be reported to Deer Crest Associates, I L C	☐	☐
5.	Copy of Building Permit	☐	☐
6	Limits of Disturbance Fencing	☐	☐
7	Evidence of Sufficient Funds	☐	☐

8 Building Information

General Contractor
Name_____
Phone #_____
License #_____
Insurance Carriers
1 Liability_____
2 Worker's Compensation_____

Job Foreman's Name_____
Home Phone_____
Cell Phone_____
Job Phone_____
Job FAX_____

Mechanical Contractor
Name_____
Phone #_____
License #_____
Insurance Carriers
1 Liability_____
2. Worker's Compensation_____

Plumbing Contractor
Name_____
Phone #_____
License #_____
Insurance Carriers
1 Liability_____
2 Worker's Compensation_____

Electrician
Name_____
Phone #_____
License #_____
Insurance Carriers
1 Liability_____
2 Worker's Compensation_____

Landscaper
Name_____
Phone #_____
License #_____
Insurance Carriers
1 Liability_____
2 Worker's Compensation_____

9	Deer Crest Builder Guidelines & Requirements	Submitted	Not Submitted
1	Site Access	☐	☐
2	Staging	☐	☐
3	Fire/Safety	☐	☐
4	Quality Assurance	☐	☐
5	Deer Crest Requirements During Construction	☐	☐

During construction the owner shall cause his Builder to conform to the following

- Builder shall satisfy all requirements of Wasatch County Municipal Code and those requirements of the applicable governmental and private agencies for the hook-up of water, power and any temporary use of such services
- Portable chemical toilet facilities and construction trash containers must be in place on the site, at an approved location, at the time construction work is commenced These facilities shall be regularly emptied and serviced at not less than twice weekly intervals Such facilities must be removed when construction is completed, or if construction is halted for more than 30 days
- No construction work may start before 7 00 a m or continue after 7 00 p m No construction work is to be allowed on Sundays or on nationally recognized legal holidays

- All noise abatement laws of Wasatch County or the DRC will be adhered to during construction
- All deliveries, loading/unloading and hauling will conform to the hours of operation between 7:00 a.m. and 7:00 p.m
- All hauling routes and load protections required under Wasatch County Municipal Code will be strictly adhered to and monitored by the construction site superintendent
- Construction site vehicles, equipment and employee vehicles will park within the construction site
- No loose dogs or any other pets of workers are permitted on site
- Litter and trash on site must be controlled and properly disposed of
- The construction site should be securely fenced and maintained in conformance with Wasatch County Municipal Code, so as not impact the adjacent areas

		Submitted	Not Submitted
10	Survey Certification by Builder of Actual Construction		
	Surveyor Name_____ License #_____ Letter of Certification	☐	☐
11	Copy of Any Red Tags by Municipality	☐	☐
12	Final Inspection	☐	☐

Exhibit G

JAMES S. JARDINE (A1647)
ROBERT P. HILL (A1492)
SCOTT A. HAGEN (A4840)
RAY, QUINNEY & NEBEKER
Attorneys for Plaintiff
79 South Main Street, Suite 400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, UTAH

----ooOoo----

BRIGHTON CORPORATION, a Utah corporation, Plaintiff, v. ISABEL M. COATS and WALTER M. COATS, individually and as Trustees of the Isabel M. Coats Trust dated December 10, 1985, GREGORY M. WARD, an individual, DOUG'S TREE SERVICE, INC., a Utah corporation, and UNKNOWN PERSONS designated as JOHN DOE NO. 1 through 10, Defendants.	:	ORDER DENYING APPLICATION FOR DETERMINATION THAT CONSENT HAS BEEN UNREASONABLY WITHHELD Civil No. 940905453 Judge David S. Young

----ooOoo----

This matter came before the Court for hearing on July 13, 1995. At issue was defendant Gregory Ward's ("Ward") Application for Determination that Consent Has Been Unreasonably Withheld ("Application"). James S. Jardine and Scott A. Hagen appeared as

counsel for Brighton Corporation. David M. Connors appeared as counsel for Ward. Prior to the hearing, the Court received and reviewed Ward's Application and memorandum in support (along with exhibits), plaintiff's memorandum in opposition, and Ward's reply memorandum in support. At the hearing, the Court heard testimony from Ward and from Neil Richardson, plaintiff's architect.

Based on the papers submitted by counsel and the testimony and exhibits presented at the hearing, the Court finds that the plans submitted by Ward for approval by Brighton Corporation do not adequately comply with the restrictive covenants of the special warranty deed or this court's previous order granting preliminary injunction. The Court therefore concludes that Brighton Corporation did not act unreasonably in rejecting the plans.

Accordingly, the Court denies Ward's Application for Determination that Consent Has Been Unreasonably Withheld.

DATED this 15th day of August, 1995.

BY THE COURT:

Honorable David S. Young
District Court Judge

0134524.01

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ORDER DENYING APPLICATION FOR DETERMINATION THAT CONSENT HAS BEEN UNREASONABLY WITHHELD was hand-delivered on this 1ST day of August, 1995 to the following:

David M. Connors
Kenneth J. Sheppard
Kevin C. Marcoux
LEBOEUF, LAMB, GREENE & MACRAE
136 South Main, Suite 1000
Salt Lake City, Utah 84101

Scott A. Hagen

0134524.01

Exhibit H

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BRIGHTON CORP.,	:	**COURT'S RULING**
Plaintiff,	:	**CASE NO. 940905453**
vs.	:	
ISABEL M. COATS,	:	
Defendant.	:	

The above-entitled matter was referred by the assigned Judge to the Presiding Judge, after the former denied recusal, determining that petitioner's affidavit of bias and prejudice was legally insufficient. This referral has been handled in accordance with Rule 63(b), Utah Rules of Civil Procedure. Rule 63(b) governs mandatory disqualification and does not relate to discretionary recusal by the challenged judge. See, State v. Neeley, 748 P.2d 1091, 1094-95 (Utah 1988). The Utah Supreme Court has interpreted the corresponding rule of criminal procedure, Rule 29, to require a showing of actual bias before disqualification is mandated. Id.; see also, State v. Humphrey, 793 P.2d 918, 925-26 (Utah App. 1990). Consequently, petitioner's affidavit of bias and prejudice must establish actual bias before disqualification of the assigned judge is required.

The Affidavit herein alleges that the affiant "believes" the assigned Judge may be biased because opposing counsel (and other members of his firm) were listed along with some 75-100 other individuals in a pre-election ad (from the fall of 1996) supporting the retention of the assigned Judge. A mere conclusory opinion or belief that the assigned judge is or may be biased is insufficient for recusal, unless the belief is based on facts demonstrating bias in fact.

Affiant has not stated, in the Affidavit or in accompanying Motion to Recuse or Memorandum in Support, any facts supportive of actual bias. An unsupported "concern about possible impartiality" is legally insufficient for a recusal.

Additionally, Rule 63(b) requires that an affidavit ". . . be filed as soon as practicable after the case has been assigned or such bias or prejudice is known." It would appear that petitioner knew of the circumstances underlying this claim of alleged bias, in October or early November of 1996, and has done nothing until the Motion was filed on May 16, 1997. This significant delay is noted and appears inconsistent with a sincerely held belief in the existence of either actual bias or the appearance of bias or impropriety.

For the foregoing reasons recusal is denied. This matter is referred back to the assigned judge for further proceedings and disposition.

Dated this 9th day of June, 1997.

/s/

LESLIE A. LEWIS
PRESIDING JUDGE
THIRD DISTRICT COURT

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Court's Ruling, to the following, this_____day of _____, 1997:

James S. Jardine
Attorney for Plaintiff
79 S. Main, Suite 400
P.O. Box 45385
Salt Lake City, Utah 84145

David M. Connors
Attorney for Defendant
136 S. Main, Suite 1000
Salt Lake City, Utah 84101

_____

Exhibit I

James S. Jardine (A1647)
Scott A. Hagen (A4840)
RAY, QUINNEY & NEBEKER
79 South Main, #500
P. O. Box 45385
Salt Lake City, Utah 84145-0385
(801) 532-1500
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, UTAH

----ooOoo----

BRIGHTON CORPORATION, a Utah corporation, Plaintiff, v. ISABEL M COATS and WALTER M COATS, individually and as Trustees of the Isabel M Coats Trust dated December 10, 1985, GREGORY M WARD, an individual, DOUG'S TREE SERVICE, INC., a Utah corporation, and UNKNOWN PERSONS designated as JOHN DOE NO. 1 through 10, Defendants	**ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT** Civil No. 940905453 Judge David S. Young

----ooOoo----

Plaintiff Brighton Corporation's Motion for Partial Summary Judgment came on for hearing at 8:30 a.m on January 22, 1999 before the Honorable David S. Young. James S. Jardine and Scott A. Hagen appeared as counsel for plaintiff Brighton Corporation. Douglas J.

Parry appeared as counsel for defendant Gregory M Ward Having reviewed the legal memoranda, including exhibits, submitted by counsel for both parties, having heard oral argument from counsel, and deeming itself fully advised in the premises,

THE COURT HEREBY ORDERS that Brighton Corporation's Motion for Partial Summary Judgment is GRANTED as follows

1. It is reasonable for Brighton Corporation, as a condition of reviewing future proposed plans submitted by defendant Ward, to require reimbursement of legal and professional fees and costs incurred as part of that review However, Mr Ward may challenge the reasonableness of such fees and costs at trial If it is found at trial that the amount charged and paid is reasonable, then Brighton Corporation may keep the fees and costs paid

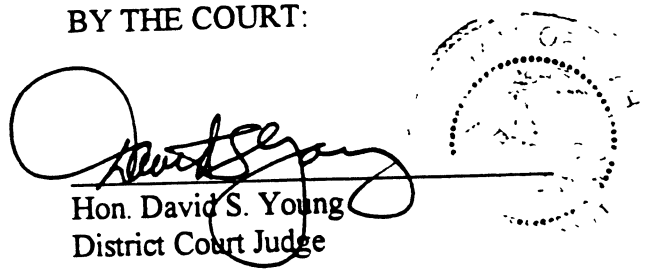
2 It is reasonable for Brighton Corporation, as a condition of reviewing any plans from Mr Ward, to require that the plans be signed by a licensed architect

3 In reviewing plans submitted by Mr Ward, it is reasonable for Brighton Corporation to apply the Foothills and Canyons Overlay Zone ordinance ("FCOZ") of Salt Lake County to Ward's proposed plans for comparison However, to the extent FCOZ contains a one-acre minimum lot size, the parties have stipulated that the provision shall not apply At trial, Mr Ward may challenge the reasonableness of specific provisions of FCOZ applied by Brighton in reviewing the plans

DATED this 3 day of ~~February~~ March, 1999

objections denied

BY THE COURT:



Hon. David S. Young
District Court Judge

Approved as to Form

_____

Douglas J. Parry

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT was hand-delivered on this 4th day of February, 1999 to the following:

Douglas J. Parry
PARRY, LAWRENCE & WARD
60 East South Temple, #1270
Salt Lake City, Utah 84111

Maria Carson

447151

Exhibit J

Douglas J. Parry, Esq. (#2531)
PARRY ANDERSON & MANSFIELD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 521-3434

Attorneys for Defendant Gregory M. Ward

IN THE UTAH SUPREME COURT

BRIGHTON CORPORATION, a Utah corporation, Plaintiff, v. ISABEL M. COATS and WALTER M. COATS, individually and as Trustees of the Isabel M. Coats Trust dated December 10, 1985, GREGORY M. WARD, an individual, DOUG'S TREE SERVICE, INC., a Utah corporation, and UNKNOWN PERSONS designated as JOHN DOES NO. 1 through 10, Defendants.	**AFFIDAVIT OF DOUGLAS J. PARRY IN SUPPORT OF GREGORY M. WARD'S PETITION FOR EMERGENCY EXTRAORDINARY WRIT DIRECTED TO JUDGE DAVID S. YOUNG, THIRD DISTRICT COURT, STATE OF UTAH**

STATE OF UTAH }
:
COUNTY OF SALT LAKE }

I, Douglas J. Parry, state under oath as follows:

1. I am over the age of 18, am legal counsel for the Defendant Gregory M. Ward in Case No. 940905453, currently pending before Judge David S. Young in the

Third District Court for Salt Lake County, State of Utah, and have personal knowledge of the matters set forth below.

2. On December 22, 1998, I was served with a motion for partial summary judgment filed by the plaintiff in this action. In that motion, the plaintiff requested the Court to rule as a matter of law on the following three issues:

(i) That Greg Ward must compensate Brighton for all further costs associated with any review by Brighton of any plans submitted by Greg Ward, including attorney's fees incurred by Brighton.

(ii) That any plans submitted by Greg Ward be approved by a licensed architect.

(iii) That Brighton could consider the Foothills and Canyons Overlay Zone ordinance ("FCOZ") in reviewing any plans submitted by Greg Ward.

None of these restrictions or requirements are contained in the Special Warranty Deed or Property Use Agreement.

3. On December 23, 1998, the day after the plaintiff's motion for summary judgment was filed, the Court held a scheduling conference. I attended that scheduling conference on behalf of the defendant Greg Ward. At the scheduling conference, the plaintiff advised the Court of the motion for partial summary judgment that had been filed the day earlier. The Court had not yet reviewed the motion, and I had not yet had any opportunity to oppose the motion. Nevertheless, the Court informed counsel for both parties that the Court was inclined to grant the motion for partial summary judgment.

4. I objected to the Court's comments, stating that I had just been served with the motion and would like the opportunity to address the motion before the Court made a decision concerning the motion. The Court responded by telling me that I could go ahead and file an opposition, but that the Court was nevertheless inclined to grant the motion. It was clear from the Court's statements to me that the Court had decided at that point to grant the motion for partial summary judgment and that any opposition that I might file would be futile.

5. I filed an opposition to the motion and a hearing on the motion was held on January 22, 1999. The Court granted the motion for partial summary judgment during the January 22, 1999 hearing.

6. As a result of the partial summary judgment, the Defendant Greg Ward is required to pay the plaintiff's attorney's fees and costs of plaintiff's architect's review of any plans that Ward submits for the construction of his cabin. On July 28, 1999, counsel for Brighton Corporation submitted a bill to Ward in the amount of $5,446.50 for Brighton's counsel's review of plans submitted by Ward. A copy of this bill is attached hereto.

7. In addition, the Court is requiring Ward to incur the additional expense of having a licensed architect sign any plans submitted by Ward, which in turn required that Ward pay a licensed architect to redraft the plans already submitted so that the architect's signature could be attached.

8. There is no requirement in the Special Warranty Deed that Ward pay any fees and costs associated with Brighton's review of plans. There is no requirement in

the Special Warranty Deed that plans submitted by Ward be drawn and signed by a licensed architect. The imposition of these requirement by the Court makes it difficult for Ward to submit plans to Brighton as a result of the excessive costs created by the Court's order.

9. I attended another scheduling conference held in this case on September 8, 1999.

10. At the time of the scheduling conference, I was not aware that a few days earlier the plaintiff had filed a motion for an order allowing pavement of the roadway across the defendant's property in contravention of the express terms of the Property Use Agreement between the parties which requires that the road remain gravel.

11. At the scheduling conference, the plaintiff informed the Court that it had filed the motion a few days earlier. The Court granted the motion for an order allowing pavement of the roadway over my objection and despite the fact that the defendant had not had notice or an opportunity to be heard on the matter.

12. I did not receive the motion until after the scheduling conference. The certificate of service accompanying the motion claims that the motion was served by mail on Friday, September 3, 1999. Because Monday, September 6, 1999 was Labor Day, there was no mail service on that day, meaning that it would have been impossible for the motion to reach my office until September 7 or 8, 1999.

13. The plaintiff filed a proposed order allowing the pavement of the roadway. I filed timely objections to the proposed order, including an objection that Mr. Ward's right to due process was violated by the Court's granting the motion without

providing Mr. Ward any notice or any opportunity to be heard. The Court denied my objections and entered the order on September 21, 1999.

14. Plaintiff's counsel recently telephoned me to request permission for the plaintiff to cut down a tree on the defendant's property associated with the pavement of the roadway. I informed plaintiff's counsel that the defendant did not agree to the request and would not allow any trees on his property to be cut down.

DATED this 30 day of September, 1999.

DOUGLAS J. PARRY

SUBSCRIBED, ACKNOWLEDGED AND SWORN TO before me this 30th day of September, 1999.

Notary Public
CLAUDINE CABLE
60 East South Temple
Salt Lake City, Utah 84111
My Commission Expires
January 22, 2000
State of Utah

NOTARY PUBLIC

STATEMENT OF ACCOUNT
RAY, QUINNEY & NEBEKER
for
BRIGHTON CORPORATION
c/o MARY BARTON
2661 ST. MARY'S WAY
SALT LAKE CITY, UTAH 84108

Greg Ward
c/o Douglas Parry
PARRY, ANDERSON & MANSFIELD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

02/08/99	Draft and revise letter to D Parry, review plans received from same, meeting with J S Jardine, meeting with M Barton regarding plans, telephone conference with S Clark regarding plans, letter to D Parry	S Hagen	3 00	450 00
02/11/99	Review letter from D Parry, revise and send letter from J S Jardine to Parry	S Hagen	50	75 00
02/12/99	Review new plans, meet with M Barton, read materials received from M Barton	S Hagen	3 00	450.00
02/17/99	Review plans, draft rejection letter to D Parry, conference with M Barton	S Hagen	3 00	450 00
02/18/99	Telephone conference with D Parry regarding issues for trial and additional plans	S Hagen	20	30 00
02/19/99	Meeting with N Richardson and clients, revise letter to D Parry rejecting plans	S Hagen	3 00	450 00
02/19/99	Meeting with M Barton, Clarks, N Richardson	J Jardine	1 00	220 00
02/22/99	Revise letter to D Parry rejecting plans	S Hagen	1 00	150 00
02/22/99	Discussions with S Hagen, review letter, filings, attend Pretrial Conference, draft outline of Trial Brief	J Jardine	50	110 00
04/12/99	Review plans, brief meeting with M Barton	S Hagen	70	115 50
04/13/99	Revise and mail letter to D Parry	S Hagen	10	16.50
04/14/99	Message to N Richardson, draft letter to N Richardson	S Hagen	.20	33.00
04/15/99	Draft and revise letter to D Parry, read transcript regarding agreement in court	S Hagen	1 90	313.50

04/15/99	Discussion with S Hagen, edit letter	J Jardine	.30	72 00
04/16/99	Telephone conference with M Barton regarding letter, telephone conference with D Parry regarding response to letter	S Hagen	.30	49 50
04/19/99	Telephone conference with S Clark regarding appointment with N Richardson	S Hagen	.10	16 50
04/21/99	Prepare for and attend meeting at N Richardson office, begin preparing letter to N Richardson	S Hagen	2 90	478 50
04/22/99	Review letters and transcript for letter to N Richardson, draft and send letter	S Hagen	3 10	511 50
04/23/99	Meet with M Barton regarding Ward's plans	S Hagen	60	99 00
04/28/99	Telephone conference with M Barton regarding instructions to N Richardson	S Hagen	20	33 00
04/29/99	Begin drafting additional letter to N Richardson, telephone conference with M Barton regarding same	S Hagen	1 30	214 50
04/30/99	Letter to M Barton regarding permitted uses, revise letter to N Richardson, telephone conference with M Barton regarding Monday meeting	S Hagen	3 50	577 50
05/03/99	Finish draft of letter to N Richardson, fax to S Clark for review, draft letter to M Barton regarding permitted uses	S Hagen	1 00	165 00
05/04/99	Telephone conference with M Barton regarding letter to N Richardson	S Hagen	20	33 00
05/13/99	Telephone conference with N Richardson's office	S Hagen	10	16 50
05/17/99	Read Richardson report, review plans, telephone conference with S Clark	S Hagen	40	66 00
05/17/99	Review Richardson letter, discussion with S Clark	J Jardine	20	48 00
05/18/99	Letter to D Parry regarding Richardson report, telephone conference with M Barton regarding same, meeting with M Barton regarding same	S Hagen	50	82 50
05/20/99	Meeting with M Barton, edit letter	J Jardine	50	120 00
TOTAL				**$5,446.50**

483092

Exhibit K

James S. Jardine (1647)
Scott A. Hagen (4840)
RAY, QUINNEY & NEBEKER
79 South Main, #500
P. O. Box 45385
Salt Lake City, Utah 84145-0385
(801) 532-1500
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, UTAH

BRIGHTON CORPORATION, a Utah corporation, Plaintiff, v. ISABEL M. COATS and WALTER M. COATS, individually and as Trustees of the Isabel M. Coats Trust dated December 10, 1985, GREGORY M. WARD, an individual, DOUG'S TREE SERVICE, INC., a Utah corporation, and UNKNOWN PERSONS designated as JOHN DOE NO. 1 through 10, Defendants.	ORDER ALLOWING PLAINTIFF TO PAVE PRIVATE ROADWAY Civil No. 940905453 Judge David S. Young

This matter came on for a pretrial conference before the Honorable David S. Young on September 8, 1999. James S. Jardine and Scott A. Hagen appeared as counsel for Plaintiff

Brighton Corporation. Douglas J. Parry appeared as counsel on behalf of Defendant Gregory Ward. During the conference, counsel for the parties discussed Brighton Corporation's request to pave the existing dirt roadway that crosses Defendant Gregory Ward's property, pursuant to a recorded easement, and leads to Brighton's property. The parties discussed the location of the roadway, the parties' agreement to amend the legal description of the recorded easement to include the physical location of the road, and Ward's objection that Brighton should only be allowed to pave the roadway if it moves its waterline from its present location into the roadway.

The Court, having determined that the waterline is placed within a separate easement and that paving the roadway would promote safety and not increase the burden on Ward's property, concluded that Brighton's request for paving the roadway was reasonable. The Court further determined that the paving should proceed immediately because of the approaching winter season.

Accordingly, IT IS HEREBY ORDERED that Plaintiff Brighton Corporation may immediately proceed to pave the existing private roadway.

DATED this 21st day of September, 1999.

BY THE COURT:

Objections denied

Hon. David S. Young
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **ORDER ALLOWING PLAINTIFF TO PAVE PRIVATE ROADWAY** was **hand-delivered**, on this 9 day of September, 1999 to the following:

Douglas J. Parry, Esq.
James K. Tracy, Esq.
PARRY ANDERSON & MANSFIELD
60 East South Temple, #1270
Salt Lake City, Utah 84111

Lorra A. Hagen

492488

Exhibit L

James S. Jardine (1647)
Scott A. Hagen (4840)
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Salt Lake City, Utah 84145-0385
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, UTAH

BRIGHTON CORPORATION, a Utah corporation, Plaintiff, v. ISABEL M. COATS and WALTER M. COATS, individually and as Trustees of the Isabel M. Coats Trust dated December 10, 1985, GREGORY M. WARD, an individual, DOUG'S TREE SERVICE, INC., a Utah corporation, and UNKNOWN PERSONS designated as JOHN DOE NO. 1 through 10, Defendants.	**ORDER GRANTING BRIGHTON'S MOTION TO ENFORCE SETTLEMENT AGREEMENT** Civil No. 940905453 Judge David S. Young

Plaintiff Brighton Corporation's ("Brighton") Motion to Enforce Settlement Agreement came before the Court for hearing on October 22, 1999. James S. Jardine and Scott A. Hagen appeared as counsel on behalf of behalf of Brighton Corporation. Douglas J. Parry and James K. Tracy appeared as counsel on behalf of Defendant Gregory M. Ward.

Based on the legal memoranda, including exhibits, filed by both parties in support of their respective positions, and based on oral argument presented by counsel for both parties,

IT IS HEREBY ORDERED as follows:

1. the stipulation stated by counsel on the record on March 3, 1999 and affirmed by the parties under oath, including the documents referenced in that oral stipulation, comprise a binding and enforceable contract which is binding on the parties.

2. That contract sets forth the criteria for Mr. Ward's submission of plans to Brighton Corporation and Brighton Corporation's review of plans submitted by Mr. Ward.

3. Accordingly, the issue to be decided at trial on November 17, and 18, 1999, is whether the plans submitted by Mr. Ward after the hearing on March 3, 1999 complied with the criteria stated in the March 3, 1999 stipulation and incorporated letters.

4. Based on the foregoing, Brighton Corporation's Motion to Enforce Settlement is hereby granted.

DATED this 3 day of ~~October~~ Nov., 1999.

BY THE COURT:

Hon. David S. Young
District Court Judge

Approved as to form:

PARRY, ANDERSON & MANSFIELD

Douglas J. Parry
James K. Tracy

01119

Exhibit M

ames S. Jardine (1647)
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, UTAH

BRIGHTON CORPORATION, a Utah corporation, Plaintiff, v. ISABEL M. COATS and WALTER M. COATS, individually and as Trustees of the Isabel M. Coats Trust dated December 10, 1985, GREGORY M. WARD, an individual, DOUG'S TREE SERVICE, INC., a Utah corporation, and UNKNOWN PERSONS designated as JOHN DOE NO. 1 through 10, Defendants.	**ORDER** Civil No. 940905453 Judge David S. Young

This matter came before the Court for bench trial on November 17, 18 and 19, 1999, the Honorable David S. Young presiding. The Court, having heard the testimony of witnesses and examined the exhibits presented by Plaintiff Brighton Corporation and Defendant Gregory M. Ward, now issues the following order, which incorporates the Court's findings of fact.

1. The parties have entered into a binding settlement agreement that is comprised of (a) the transcript of hearing dated March 3, 1999, (b) the letter dated October 28, 1998 from James S. Jardine to Brent D. Ward, (c) the letter dated February 22, 1999 from James S. Jardine to Douglas J. Parry, and (d) two checklists made up of (i) the "Initial Preliminary Plan Checklist" and (ii) the "Construction Document Checklist." The checklists are the first six pages of trial exhibit 4-p. The terms of the settlement are stated in those documents, except that there are three exceptions to application of the Checklists as stated in the hearing on March 3, 1999.

2. The plans at issue in this trial, which were submitted to Brighton Corporation for review in June 1999, did not comply with the settlement agreement. Accordingly, Brighton Corporation properly rejected those plans. Brighton correctly determined that the plans submitted in October 1999 were not properly presented for review and did not review them. Accordingly, those plans were not considered during the trial.

3. There was inadequate communication between the parties, which the Court finds was principally caused by Ward. In particular, the Court finds that both Ward and his architect, Kimble Shaw, knew that the plans submitted to Brighton Corporation in June 1999 were not final plans, but neither Ward nor Shaw ever advised Brighton of that fact, even after receiving Brighton's rejection letter dated June 23, 1999, which made clear that Brighton believed it had reviewed (and rejected) final plans.

4. The Court finds, based on Mary Barton's scheduled medical treatment out of the area and on Defendant's stipulation that a four-month period of repose was reasonable under

the circumstances, that Brighton is entitled to a period of repose from November 19, 1999 until April 1, 2000, during which no plans shall be submitted to Brighton for review.

5. Brighton requested, pursuant to the settlement agreement, that Ward remove all plans currently on file or in the possession of Salt Lake County building and zoning authorities. The parties are to determine the effect of removing the plans and either remove them or apply to the Court for further guidance on that issue.

DATED this 3 day of ~~December~~ February, 1999.

No objections, David

BY THE COURT:

Hon. David S. Young
District Court Judge

Approved as to form:

PARRY, ANDERSON & MANSFIELD

Douglas J. Parry
James K. Tracy

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ORDER was mailed, postage prepaid, on this 7th day of December, 1999 to the following:

Douglas J. Parry, Esq.
James K. Tracy, Esq.
PARRY ANDERSON & MANSFIELD
60 East South Temple, #1270
Salt Lake City, Utah 84111

505239

01693

Exhibit N

19.72.030 Development Standards

A. Lot and Density Requirements

B. Slope Protection Standards

C. Grading Standards

D. Streets / Roads and General Site Access

E. Driveways

F. Trail Access

G. Fences

H. Tree and Vegetation Protection

I. Natural Hazards

J. Stream Corridor and Wetlands Protection

K. Wildlife Habitat Protection

L. Site Development and Design Standards

M. Traffic

Lot and Density Requirements.

1. General Rule. All development in the Foothills and Canyons Overlay Zone shall comply with the standards for minimum lot size, minimum lot width, and maximum density required in the underlying zone

2. Exception to the General Rule--When Underlying Zone Permits Smaller than 1-Acre Lots.

   a. Lots Created After the Effective Date of this Ordinance. If the

Figure 4. Intrusive Ridgeline Development Generally Prohibited

4. Steep Slopes--Open Space. One hundred (100) percent of areas with slope greater than thirty (30) percent shall remain in natural private or public open space, except as expressly allowed in this Chapter.

G Grading Standards.

1 Grading Prohibited Without Prior Approvals/Permits. No grading, excavation, or tree/vegetation removal shall be permitted, whether to provide for a building site, for on-site utilities or services, or for any roads or driveways, prior to issuance of a building permit in accordance with a grading and excavation plan and report for the site approved by the Development Services Engineer.

2 Cutting to Create Benches. Cutting and grading to create benches or pads for additional or larger building sites shall be avoided to the maximum extent feasible. (*See* Figures 5 and 6 below.)

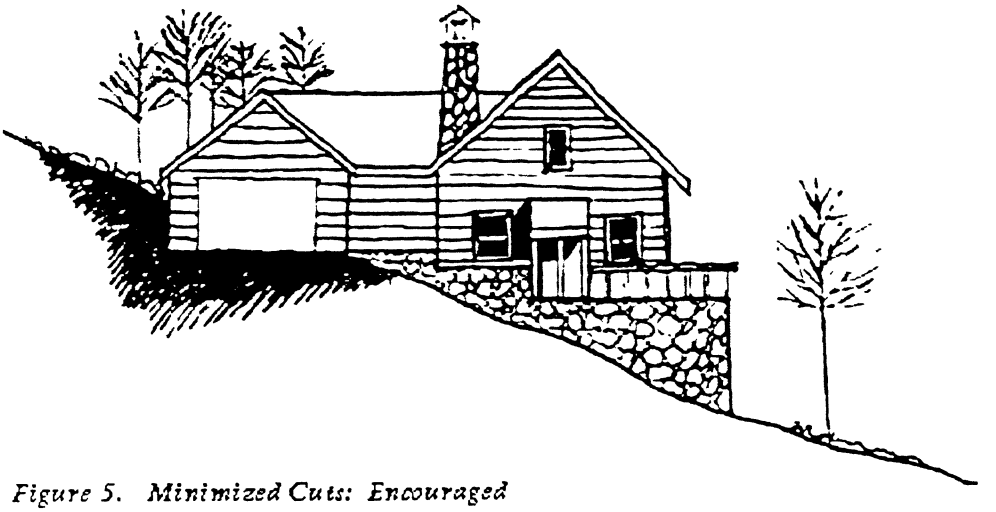

Figure 5. Minimized Cuts: Encouraged

Figure 6. Excessive Cutting: Discouraged

3 Limits on Changing Natural Grade. The original, natural grade of a lot shall not be raised or lowered more than four (4) feet at any point for construction of any structure or improvement, except:

a The site's original grade may be raised or lowered a maximum of six (6) feet if retaining walls are used to reduce the steepness of man-made slopes, provided that the retaining walls comply with the requirements set forth in this section.

b. The site's original grade may be raised or lowered more than six (6) feet with terracing, as specified in Section 19.72.030.C.8.b.

4. Grading for Accessory Building Pads Discouraged. Separate building pads for accessory buildings and structures other than garages, such as tennis courts, swimming pools, outbuildings, and similar facilities, shall be discouraged except where the natural slope is twenty (20) percent or less.

5. Limits on Graded or Filled Man-Made Slopes.

    a. Slopes of twenty-five (25) percent or less are greatly encouraged wherever possible.

    b. Graded or filled man-made slopes shall not exceed a slope of fifty (50) percent.

    c. Cut man-made surfaces or slopes shall not exceed a slope of fifty (50) percent unless it is substantiated, on the basis of a site investigation and submittal of a soils engineering or geotechnical report prepared and certified by qualified professional, that a cut at a steeper slope will be stable and will not create a hazard to public or private property.

    d. All cut, filled, and graded slopes shall be recontoured to the natural, varied contour of the surrounding terrain.

6. Revegetation Required. Any slope exposed or created in new development shall be landscaped or revegetated pursuant to the standards and provisions set forth in Section 19.72.030.H., "Tree and Vegetation Protection," below.

7. Excavation. Excavation for footings and foundations shall be minimized to the maximum extent feasible in order to lessen site disturbance and ensure compatibility with hillside and sloped terrain. Intended excavation must be supported by detailed engineering plans submitted as part of the application for site plan approval.

8. Retaining walls. Use of retaining walls is encouraged to reduce the steepness of man-made slopes and to provide planting pockets conducive to revegetation. (*See* Figure 7 below.)

    a. Retaining walls may be permitted to support steep slopes but shall not exceed six (6) feet in height from the finished grade, except where terraced as specified in subsection (b) below.

b. Terracing shall be limited to two tiers. The width of the terrace between any two four-foot vertical retaining walls shall be at least three (3) feet. Retaining walls higher than four (4) feet shall be separated from any other retaining wall by a minimum of five (5) horizontal feet. Terraces created between retaining walls shall be permanently landscaped or revegetated pursuant to §19.72.030.H., "Tree and Vegetation Protection," of this Chapter.

c. Retaining walls shall be faced with stone or earth-colored materials similar to the surrounding natural landscape. (*See* Chapter 19.73, "Foothills and Canyons Site Development and Design Standards.")

d. All retaining walls shall comply with the Uniform Building Code, except that when any provision of this section conflicts with any provision set forth in the UBC, the more restrictive provision shall apply.

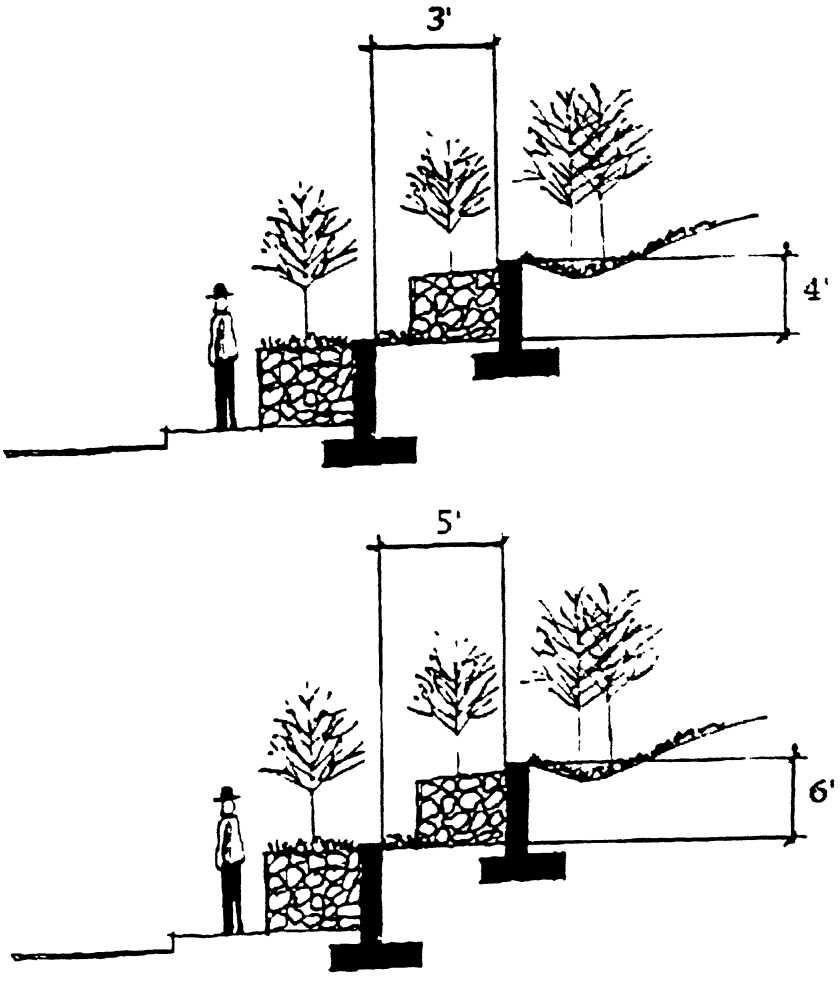

Figure 7. *4' High Retaining Walls Require 3' Minimum Horizontal Separation*

Retaining Walls Higher than 4' Require a Minimum 5' of Horizontal Separation

9 Filling or Dredging of Waterways Prohibited. Filling or dredging of water courses, wetlands, gullies, stream beds, or stormwater runoff channels is prohibited, except that bridge construction is allowed pursuant to the standards set forth in Section 19.72.030.J.7. below.

10. Detention/Stormwater Facilities. Where detention basins and other storm and erosion control facilities may be required, any negative visual and aesthetic impacts on the natural landscape and topography shall be minimized to the maximum extent feasible. (*See* Figures 8 and 9.)

(Ord. 966 3, 1986: (part) of Ord. passed 9/25/80: prior code 23-35-4)